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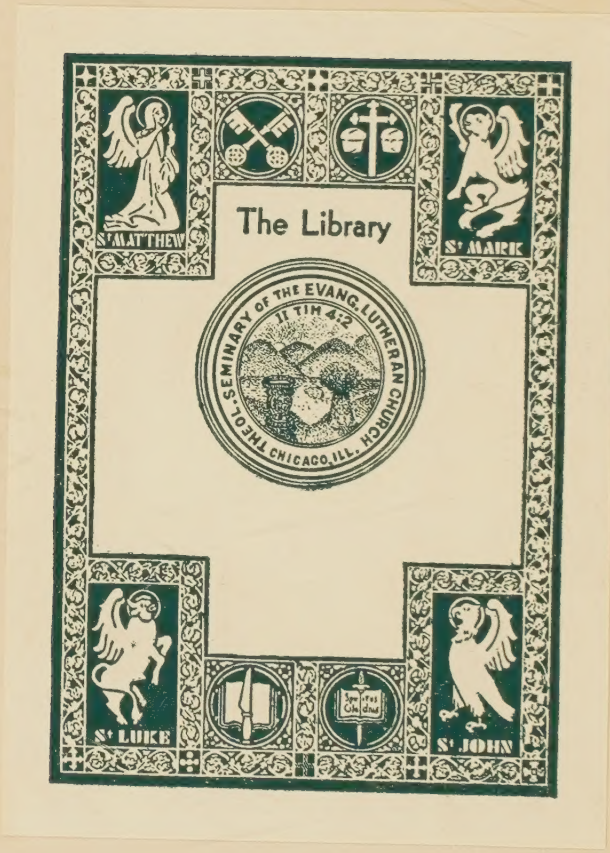
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THE JEWISH LAW OF THEFT

With comparative references
to Roman and English Law

BY

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN THE DROPSIE COLLEGE FOR HEBREW AND COGNATE LEARNING

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DEDICATED TO THE MEMORY OF

MY FATHER ז"ל.

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THE JEWISH LAW OF THEFT

I

INTRODUCTION

A. Sources of the Jewish Law

The study of the Jewish law has, up to recent times, been carried on almost exclusively by non-jurists. Theologians examined the early Hebrew law for its fundamental character of justice and for its religious concept of monotheism; archaeologists searched for early traces of civilisation; students of literature derived satisfaction from its pithy style and the variety of subject matter treated; economists praised its social institutions and the wisdom of its law of property; orientalists compared it with similar codes of contemporary nations. But the jurists, with very few exceptions, left it severely alone.

If the Biblical law remained the hunting ground of amateurs in law, the Talmudic law, and its development in the Responsa of the heads of the Babylonian and Palestinian Academies, the Geonim, and the Codes and Responsa of the Rabbis up to the present day, fared even worse. The Biblical material is at least accessible, even for those who do not master Hebrew, in authoritative translations which render the meaning of the original with a workable fidelity (though it must be admitted that it is impossible to grasp the content of written law fully without constant reference to the living law embodied in the traditions and customs of the people and in the interpretations of its judges).

The Talmud, in its greater part, is written in Aramaic and only to a small extent in Hebrew. There are no scholarly

translations available (with perhaps one exception, the German translation by Goldschmidt, which is approaching completion). It is at best a difficult task to translate into the vernacular a body of laws based on principles entirely different from those of modern laws. Certain phrases serve as concentrated key words which have to be deciphered before they can be translated. The dialectics of the Talmud do not readily appeal to the untrained; the arrangement of its legal and non-legal material is baffling to the modern student. There are deceptive similarities between institutions mentioned in the Talmud and institutions in Roman and Modern laws; many appear to be identical until the difference of their origin is laid bare. To quote only one example: the well known German jurist Professor Joseph Kohler wrote a thesis on the similarity of the institution of '*usucapio*' in Roman law and '*ḥazaḳah*' in Jewish law, misled by the interpretation of the latter term by scholars not legally trained. This explains the need of examining the sources at first hand; very few scholars possess both the necessary legal and philological training.

In addition to these difficulties there is another obstacle in the way of the student. The Talmud is no law book. It is a collection of literary records, some long and detailed, some short and involved, many quite fragmentary. The major portion is given over to practical legislation affecting human relationships of all kinds as e. g. civil law, rudiments of criminal law, public law, conflict of laws, etc., the so called *Halakah*, or rules of conduct; in addition there is a great mass of material of the most varied kind, best characterised as the non-legal part of the Talmud or *Haggadah*. The *Haggadah* contains, besides homilies based on scriptural portions and the discussion of metaphysical, eschatological, mythological concepts that were current from the time of its inception to its final edition in 500 C.E.—the *Haggadah*

contains besides all these a resume of all the miscellaneous knowledge with which the Jewish scholars of the Talmud came into touch. There are innumerable references to Greek, Roman, Persian cultures, to the sciences and superstitions of the day, to histories and literatures.

There is, unfortunately for the student, no clear cut division in the Talmud between the legal and the non-legal parts. Close upon a keen argument between two opposing schools as to what might be the right course to follow in a given case, nay, often right in the middle of the discussion, the *Haggadah* would appear unanounced, calling a halt to the contending parties and offering some beautiful stories historic or folkloristic, or a naively beautiful description of God's kindness to His creatures, or an exegetic evaluation of niceties of style. Was it that the mind of the Talmudic scholar was so elastic that it could instinctively swing back to serious discussion, often carried on with a logical keenness paralelled only by the best trained lawyers of today; or was it a way to safeguard their energy, to cool brows heated in argument? The modern student without a trained guide finds it perplexing to trace his way about. Without a tested pilot he is lost in the "sea of the Talmud."

Further, the Talmud does not formulate general legal principles from which individual cases could be deduced, after the manner of the Roman law or the Continental laws based on the Roman law. Nor is there an attempt to show the interdependence of various legal institutions. The Talmudic law comprises in effect rather a collection of individual cases with arguments attached and treatises tacked on, and illustrations added, analogies cited and logical and exegetical interpretation exhibited, to justify the interpretation or decision arrived at in a particular case. In this respect it resembles most the Anglo-Saxon Common Law which despite its lack of scientific arrangement has

served its purpose very well, relying, as did the Jewish law, more upon the ability of the judges in court to apply precedents and define concepts than on the jurists who try to present a ready made law. Even the Romans recognised the risk of relying on abstract untested rules. "Omnis definitio in jure civile periculosa est."

The material in Post Talmudic Codes was indeed arranged according to certain principles. But it is characteristic that, while the Jewish mind readily found the way towards the systematisation of philosophy, religion and ethics, it somehow shrank from systematising the legal material. The classification in the most celebrated of Post Talmudic Codes, the *Yad ha-Ḥazaḳah* of Maimonides, (completed 1180), was inspired more by philosophic considerations—Maimonides was an ardent admirer of Aristotle—than by juristic principles. Maimonides did not attempt a thorough reorganization of the juristic material of the Talmud nor its logical systematization. He merely arranged the subject matter more logically, collecting it from its widely distributed sources all through the Talmud. Maimonides states his legal decisions without any reference to the motives behind them. His work is more an encyclopedia of the Talmud than a legal code.

The Code of R. Jacob ben Asher, *Arba'a Ṭurim*, (written about 1340) is the next important one. It shows a decided improvement over the code of Maimonides. Its arrangement is much more logical. The author cites his sources, quotes dissenting minority opinions and thus enables the student to know the arguments pro and con. R. Jacob was however criticised for relying exclusively on his own judgement or following piously the opinion of his father when making decisions.

The commentary of R. Joseph Caro (d. 1575) to the Ṭurim, *Bet Joseph*, was still more satisfactory. When

deciding points at issue, R. Joseph would cite the opinion of three generally recognised authorities, Alfassi (d. 1103), Maimonides, and R. Asher, and, whenever there was a conflict of opinion, consider a decision final if supported by two out of the three. In addition, he incorporated into his commentary all important dicta of other authors since the Ṭurim had been written and, what is more to the point, he traced the origin and development of individual laws and of the methods of their derivation critically, by agreeing with one author and opposing the other, always on the basis of a re-examination of the sources. Finally, retaining the arrangement of the Ṭurim, R. Joseph epitomised the *Bet Joseph* in his *Shulḥan Aruk* which, together with the commentaries based on it, became the authoritative code of Jewish religious practice. R. Joseph, in his work, never intended to represent a final development in Jewish law.

Finally R. Michael Epstein, about 40 years ago, compiled the *Aruk ha-Shulḥan* a commentary and code in one, of the Jewish law quoting copiously modern authorities.

It is evident that it is the duty of a student of the Jewish law to wind his way upwards from the Talmud to the Codes (and the commentaries) and to study the latter carefully, since there was a development of the Jewish law in the time between the final edition of the Talmud and the Shulḥan Aruk.

Yet the Talmud with the Codes and Commentaries by no means exhaust the sources of the Jewish law. There is the great number of the Responsa Prudentium, the responsa of the leading Rabbinic authorities throughout the Middle Ages and modern times, scattered in some fifteen hundred printed volumes and endless manuscripts scarcely indexed in the codes and commentaries.

The foregoing sketch attempts to explain the technical difficulties that beset the path of him who would make a scientific study of the sources of the Jewish law.

There are other obstacles, practical and philosophical.

So far the preliminary work of dealing with the historic layers of the legal material has not even been outlined. (See M.W. Rapaport, "Die Methodenfrage beim juedischen Rechte" etc. in Zeitschrift f. Vergl. Rechtsw. vol. XXXIII. p. 29ff). It is obvious that it will be possible to start writing a legal history only after the legal material for each epoch has been historically sifted.

The character of Judaism as a revealed religion on the face of it makes the assumption of a gradual development of the law impossible. "The notion of progressive revelation was impossible; the revelation to Moses was complete and final; no other prophet should ever make an innovation in the law." (Moore, Judaism, vol. I p. 239). Hence many a student of the Jewish law out of loyalty to this principle, refrained from treating the material historically.

Yet perhaps the loyalty of those who refused to treat the Jewish law historically was not based on a rational and accepted interpretation of the "Sinaitic origin" of the Law. There are paradoxical statements in the Talmud which teach at the same time the Sinaitic origin and the gradual development of the Law. Dr. S. Kaatz, in Die Muendliche Lehre und Ihr Dogma, Berlin 1923, p. 48 suggests that the "double truth" of this dogma leads, according to the scholars of the Talmud, to the following unity: "Every interpretation of the Law given by a universally recognised authority, is regarded as divine and given on Sinai in the sense that it is taken as the original divinely approved (gottgewollte) interpretation of the text; for the omniscient and all wise God included in His revealed Torah every shade of meaning which divinely inspired interpreters subsequently

discovered .... Therefore every interpretation is called *derash*, a searching for what God had originally put there ... Every interpretation given by the scholars of the Talmud Moses had received on Mount Sinai; for he had received the Torah and the interpretation was contained in it, not mechanically, but organically, as the fruit of a tree was contained in the seed out of which the tree had grown .... In every interpretation of the scholars the fruit, before virtually invisible, became a real visible fruit. In this sense was the fruit Mosaic, Sinaitic, though it was hidden to Moses."

A development of the Torah by means of interpretation by duly qualified authorised representatives of the Law then is assumed even in the Talmud and might in future, when the preliminary spade work has been done, lead to a renewed effort of tracing the gradual growth of the Jewish law.

B. The Historic Distinctiveness of the Jewish Law

The place accorded to the Jewish law in the legal science of today will grow in importance, in proportion to the discovery of its historic uniqueness.

The laws of other nations as a rule exhibit the growth of a legal system on a well defined part of the globe within an easily definable period of history. Not so the Jewish law. In following its development, from the dawn of Hebrew history in Ancient Mesopotamia to the present, one is brought successively into contact with almost all legal systems of importance in ancient, medieval and modern times—at least as far as the Near East and Europe are concerned.

One sees in turn, in the path of the Jewish law, the codes of Ancient Babylonia, the laws of the Hittites, the Egyptians, Assyrians and Persians. The first conflict between East and West during the period of Hellenism brings the

Jewish law into close touch with Greek law; the conquest of the Orient by Rome with the Roman law; and of course there was throughout contact with the East Mediterranean Common Law. Later when the destruction of the national center in Jerusalem sent the Jews scattering to the chief cities of the dispersion, their legal institutions were confronted with the Parthian and the Neo-Persian law in the East, with the Mohammedan law throughout the vast domain of Islamic influence from Bagdad to Spain, with the European laws in medieval and modern times.

During this unique range of legal development, the Jews for long periods enjoyed legal autonomy in civil, and, for a short period, also in criminal matters. Throughout these epochs the Jewish jurists were establishing precedents under the influence of these varying cultures.

The law of the Talmud is clearly influenced by foreign laws, particularly since the adoption of the principle "dina de malkuta dina," (the civil law of the land must be recognised as authoritative Jewish law) in the third century C.E. opened the door to such influence. (Cf. Chapter VI. post). Modern scholars have shown conclusively that there was an intimate relationship between the Jewish law on the one hand and the Graeco-Roman, Persian, Armenian and Mohammedan laws on the other hand.

If Jewish law was influenced, as indicated above, it also in turn influenced others. According to Professor Nathan Isaacs (Cf. The Legacy of Israel, Oxford 1927 pp. 379 ff.) there were, in the Middle Ages, Jewish influences at work throughout Europe in numerous domains of the civil law. "In many of these instances . . . in family law, including marriage, divorce, domestic relations, inheritances . . . even in the laws of Roman law countries it is easier to trace a kinship with Judaism than with the civilisation of the Roman world." . . . "It is generally conceded that

negotiable paper was introduced into Europe by Jews as well as the keeping of public records of private transactions." . . . The manner in which the Rabbis of the Middle Ages solved the housing problem in the overcrowded ghetto tenements, commended itself to the Popes who made it binding on the Christian landlords of the ghetto with the result "that Jewish tenants had a kind of perpetual leasehold interest . . . for which compensation was made to them in Rome when ghetto property was taken over for State purposes." This experience of the Jews was cited recently in the arguments before the Supreme Court "as an illustration of the reasonableness of such provisions in the face of a housing shortage." . . . "The first Christian recognitions of exclusive rights in a book seem to have been in direct imitation of the Jewish." . . . "Long before there was any thought of the protection of the good will of a business in the laws of Europe, Jewish law limited the competition of Jews for each other's customer."

These mutual assimilations testify on the one hand to the breadth of the Jewish jurists and on the other to the richness of Jewish legal experience.

There were however certain legal institutions of foreign nations which could never have been adopted by the Jewish law. These rejections are perhaps more characteristic than the accretions: The extreme form of talion in the laws of Ancient Babylonia which punished a man who had negligently brought about the death of another man's child, by killing his child; the laws of Ancient Greece permitting the exposure to death of deformed children in the interest of a sturdy crop of citizens; the enmity shown to strangers by both Greek and Roman, the ostracism of all "Barbarians," the cruel punishments meted out by their laws in case of delicts against property, the extreme development of the right of ownership without regard to the interests of fellow-

men; the introduction of torture into the legal procedure of the Middle Ages, the denial of recognition to women before the law etc.—in short legal institutions which lacked the essentials of humanitarianism and therefore ran counter to the principles of the Torah.

It was a Jewish teacher who, in the second century C.E., advocated the abolition of the death penalty. It was the Jewish law which even in early Talmudic times insisted that equal rights be accorded to Jews and non-Jews, which in the domain of the criminal law advocated measures calculated to compensate the sufferer without at the same time pushing the malfeasant into the class of the enemies of society.

It is the historic uniqueness, the humaneness and the workableness of the principles of the Jewish law which, we hope, will in future turn the attention of Jewish and Gentile students to Israel's juristic experiences as a part of universal history that has a value and a meaning for the world.

C. Meaning and Scope of Subject

The Roman conception of theft was very comprehensive. According to the jurist Paulus[1] it included any kinds of fraudulent dealing with a person's property, even one's own, by which a dishonest appropriation could be effected.

This definition was subsequently incorporated by Justinian in his Institutes,[2] and with some verbal alterations adopted by the English jurist Bracton.[3]

[1] Digest XLVII 2. 1. 3. 'Contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei vel etiam usus ejus possessionisve.' As the definition shows, 'furtum' could be committed by a man stealing his own property, as when a proprietor steals from a usufructuary or a pawnor from a pawnee. 'Si creditor pignare utatur, furtum committit.'

[2] Inst. 4, 1. 1.

[3] Bracton, famous judge and author of the 'Laws of England', died 1268. He was a pupil of Azo at Bologna and an admirer of Roman

The Germanic nations, however, considered no conduct as theft unless it involved a change of possession[4] ('a taking and carrying away'). The English Law followed this idea.

Moreover the English judges, for motives of humanity, narrowed the idea still further, e. g. they qualified the idea of a movable article by holding that a title deed, inasmuch as it evidenced ownership of real (immovable) estate, could not be stolen.[5]

They fictitiously narrowed possession into 'legal possession,' i. e. a Carrier, or other bailee, who was considered in law to have 'legal possession,' could not steal things entrusted to him, inasmuch as his taking would not amount to a change of legal possession. They modified the idea of legal possession; e. g. a servant, receiving from a third party some moveable article for his master could not commit theft of it. (But it was made Embezzlement by Statute in 1799).[6]

Similarly, on the part of the juries, the severity of the sanction imposed for theft (in most cases it was the penalty of death) caused them to defeat the law by committing what Blackstone so aptly terms "a kind of pious perjury," e. g. by falsely undervaluing a thing stolen to turn 'Grand Larceny' into 'Petty Larceny.'

By all these changes Larceny came to be: "The taking and carrying away, (this was the old Common Law Crime),

Law. The subtle influence which Roman Law had been exercising on the development of English Law was finally thwarted by the legislation of Edward I. (1272–1307). Bracton (III, 32) omits the words 'lucri faciendi gratia,' in his definition of theft.

[4] C. S. Kenny, Outlines of Criminal Law (Cambridge 1917) p. 180ff; S. Mayer, Die Rechte der Israeliten, Athener und Römer, Trier 1876, p. 587 note 67; H. Lammasch, Grundrisz des Strafrechts, Leipzig 1911, p. 89.

[5] Cf. Kenny, op. cit. p. 221.

[6] On the other hand the need of protecting the public, caused the judges to extend the law of larceny to 'Custodians' i. e. servants etc., and made the English Parliament to extend it to bailees.

or the appropriating by a Bailee, (new Statutory Crime), of another person's personal chattel, of some value, without any claim of right, and with the intention to deprive that person of all the benefit of his own rights in the chattel."[7]

In Jewish Law the term גנב *ganab* denotes the clandestine, deceitful taking of a moveable article.[8] The term גנבה *genebah*, theft, is not so vague as in Roman Law. It is clearly marked off from אונאה *ona'ah*, overreaching, fraudulent representation, and from מעילה *me'ilah*, trespass in regard to res sacrae.[9]

In order that *genebah* be committed, a change of physical possession is requisite. This change of possession must take place by one of the modes of *ḳinyan* i. e. the modes of acquisition legally recognized in a contract of bargain and sale.

This conception of 'physical possession' is worked out to such minute detail by the Scholars of the Talmud, that it rivals in thoroughness the corresponding cases in English Law. It shows to a remarkable degree how certain modern legal conceptions have been anticipated in the discussions of the jurists of the Talmud.

Both in the English and Jewish Law the taking of a document of an evidentiary character was not considered theft.

But whereas this rule in English law was, as we have seen, the result of the judges' reaction to the undue severity of the Law, the Jewish judges were able to deduce it as a matter of right. A document of such a nature was not regarded as having any distinct commercial value of itself,

[7] Kenny op. cit. 182.

[8] This is apparent from its use in Bible and Talmud. See Chap. III. A. 'The definition of Theft and Robbery.'

[9] But it must be admitted that the ethical principle connected with every Jewish Law has in the case of *genebah* extended its application to many kinds of taking that do not fall within the definition of technical theft. See Chap. X. 'Non-Technical Thefts.'

since its efficacy depended upon its bona fide possession, which had to be proved, before the Court would confirm its validity.[10]

The idea of possession, as distinct from ownership, was clearly recognized in Jewish Law. But the protection accorded to either of them was qualified. Both the Roman and English Law put the possession by a thief of an article which he has stolen, on the same basis with rightful possession. Hence in both systems one may commit the wrong of stealing from a thief.

The Jewish Law, while insisting upon the restitution of the article so taken,—with one exception, in case the thief should have become owner by means of שנוי '*shinnuy*'[11]—does not recognize the thief's possession so as to brand a taking from him as *genebah*.

Similarly, in the case of ownership, the severity of the Roman Law has been considerably mitigated by the Jewish Law, and for the sake of "maintaining and promoting the peace of the world" restrictions have been put upon its scope. This is especially apparent from the various ordinances תקנות—*taḳḳanot*—that breathe a spirit of equity unmatched by the legislations of other nations.[12]

Bailees in Jewish Law have legal possession but, similarly to English Law, a conversion by them[13] was regarded as transforming their legal possession into an unlawful one. It is interesting to note how the Jewish Law has met the problem of according protection to the bailee's legal posses-

[10] See chap. IX. 'Value.'

[11] See chap. V (f), 'Ownership created by the Thief.'

[12] See M. Eschelbacher in Herman Cohen's Festschrift, Berlin 1912, p. 501ff.

[13] 'Breaking bulk' cf. the celebrated Carrier's Case, Y. B. 13 Ed. IV. f. 9 Pasch. pl. 5.

sion, while at the same time pronouncing a taking by him larcenous.

There was no need for a Jewish Court of Law to violate the truth in order to mitigate the severity of punishments imposed for the commission of *genebah*. The humane and at the same time eminently practical sanctions were proportionate both to the loss suffered by the owner and to the severity of the offence committed by the wrong-doer. Even their most severe application, the "sale of the thief," amounted in fact to a sale of his time and work under the supervision of the Court and gave the owner of the article stolen no personal right over his body.

These sanctions, on the one hand, acted as a wholesome palliative for the revengeful feelings of the owner, who was compensated for the damage he had suffered, and on the other hand they took into account the human dignity of the offender, who was to be re-educated to become a useful member of society, and not to be debased by undue cruelty of punishments. Also, the duty imposed on the owner of equipping the thief, at the time of his release, with the necessary minimum to re-start in life,[14] and the limitation of the sale to a maximum period of six years, tended to become what M. Hoffman calls "eine segensreiche soziale Erziehungsmassregel für die durch eigene Schuld oder Not in das Proletariat hinabgesunkenen Volkselemente."[15]

Modern legislation shows that at the basis of a successful administration of justice lies the confidence reposed by the citizens in the efficacy and wisdom of the sanctions applied. Though the arguments of the "honorable" thief in Reade's

[14] Deut. 15, 12–18. Cf. G. F. Moore, Judaism in the First Centuries of the Christian Era, vol. II. Cambridge 1927, pp. 135; 163.

[15] M. Hoffmann, Judentum und Kapitalismus, Berlin 1912, p. 121.

"The Cloister and the Hearth"[16] can be easily refuted, they reflect to a certain extent the popular opinion of the time against the severity of punishments because this severity creates a defiant attitude in the offenders.

The rule of '*Market Overt*' is unknown to the Roman Law. It is a well known element of the English Law, and is designed to protect the unsuspecting buyer of goods in open market against a legal defect in the goods bought or in the person of the vendor. The Jewish Law has a similar provision which, in its scope is more extensive since it aims not only at protecting an innocent buyer against a mala fide vendor, but also the innocent owner (who has been deprived of his chattel) against a mala fide buyer. According to M. Hoffmann, the Jews in the middle-ages, in their dealings with non-Jews, adhered strictly to these principles and were successful in introducing them into the Christian Courts of their times.[17]

[16] Cf. "The Cloister and the Hearth," Crosset and Dunlap, New York, p. 159; 'Tell me first, is it true what men say of you Rhenish thieves, that you do murder innocent and unresisting travellers as well as rob them?' —The other answered sulkily: 'They you call thieves are not to blame for that: the fault lies with the Law.' 'Gramercy! so it is the law's fault that ill men break it?'—'I mean not so; but the law in this land slays an honest man an' if he do but steal. What follows? He would be pitiful but is discouraged therefrom; pity gains him no pity and doubles his peril; an' he but cut a purse his life is forfeit; therefore cutteth he the throat to boot, to save his own neck; dead men tell no tales. Pray then for the poor soul who by bloody laws is driven to kill or else be slaughtered; were there less of this unreasonable gibetting on the highroad, there should be less enforced cutting of throats in dark woods, my masters.'

A similar argument is used in the curious medieval chronicle "Der abenteuerliche Simplizissimus" edited by L. B. Kolbenheyer, Berlin 1922, p. 237ff.

[17] Cf. Hoffmann op. cit. p. 16. "Der Schutz des gutgläubigen Erwerbers ist schon im Talmud ausgesprochen (Mishnah Baba Kamma 10, 3). Diese verkehrsfreundliche Auffassung haben die Juden während des ganzen Mittelalters in ihrem Rechte beibehalten and haben es durch-

The element of *'lucri causa,'* of intended gain by the thief on committing theft, is an essential element in the definition of the Roman 'furtum' and also in the definition of "Diebstahl" in the German and Austrian Penal Codes, which are largely based on the Roman Law. In English Law it is of no account. In Jewish Law it seems to be of no decisive import in causing a taking to be a wrong of *genebah.*[18]

The conception of יאוש *ye'ush* abandonment[19] is peculiar to the Jewish Law.

The Law of Proof shows in both its main parts, Presumptions and Evidence, that the Jewish Law was fully alive to the need of fixed standards in determining questions of fact. Although the Jewish Court of Law consists of judges who were at the same time the jury i. e. decided both questions of fact and of law, there were ample precautions for ensuring a just trial to the accused, and especially for providing that the evidence produced be the best obtainable; the aim of the Law being to protect the offender rather than to implicate him in the crime. In this respect there are remarkable similarities between the English and Jewish Law.

The famous exhortation to the witnesses in a criminal case, in a Jewish Court of Law[20] reads like a modern appeal to those nations who still resort largely to hearsay evidence in condemning their prisoners and who, lacking the searching strictness of the Jewish and Anglo-Saxon rules of evidence are responsible for frequent miscarriage of justice.[21]

gesetzt, dass sie auch in der Rechtssprechung christlicher Gerichte zur Anwendung gelangte."

[18] A. Gulak, Yesodĕ ha-Mishpat ha-Ibri II., p. 219 n. 2.

[19] See chap. V, 'Ownerless Things.'

[20] See ch. XIX, 'Evidence.'

[21] The jurist who on behalf of the British Government attended the Dreyfus trial reported that the overwhelming part of the evidence produced was mere hearsay evidence that would be rejected in an English Court of Law. Cf. Kenny op. cit., p. 364.

II

MENS REA

The Mental and the Physical Element in the Wrong

Every wrong consists of a combination of two elements, one mental and the other physicial, which in general must be present at the same time, in order to constitute the wrong.

An evil intention in itself, the '*mens rea*,' (though the Jewish Law regards it as a potential source of wrong. if allowed to remain unchecked)[22] will not be taken cognisance of in a Court of Law, unless accompanied by some overt evil act or vicious conduct, the '*actus reus*'. But even if both these elements are present, it must be clear beyond any doubt that the wrong doer's *mens rea* was due either to intentional or negligent wrong doing and not to unavoidable accident or mental incompetence.

It is evident that though the objects of *mens rea* and *actus reus* are different wrongs, their essential elements must needs remain the same.

The guilty mind

The essential mental element in the commission of a wrong is the presence of the guilty mind, the *mens rea*.[23]

The famous German jurist F. Liszt defines it as "die psychische Verknuepfung der Willensbetätigung des Verbrechers mit dem Erfolge der Handlung," which may be rendered as "the psychological connection between the

[22] Cf. Abraham Ibn Ezra on Exod. 20, 14; S. R. Hirsch, Exodus, p. 216.

[23] Cf. J. Steinberg, "Rechtswidrigkeit und Schuld im Strafrechte des Talmud," Zeitschrift für Vergl. Rechtswiss. XXV.—This chapter, as far as it refers to Jewish Law, is based mainly on the arrangement followed in Steinberg's Essay; Ch. Tschernowitz, She'urim be-Talmud, Warsaw, 1913 p. 15.

working of the will of the malfeasant and the consequences of his act."[24]

Professor Kenny[25] says the "psychological element which is indispensable in crime may be fairly accurately summed up as consisting simply in intending to do what you know to be illegal."

In Jewish Law the mental element כונה *'kawwanah,'* is more complex than 'intention' in English Law.

The two forms of Mens Rea

A) Intentional Wrongdoing and B) Wrongdoing by Negligence are the two species of mens rea known both to modern and Talmudic law.

A) Intentional Wrongdoing

As far as intentional wrongdoing is concerned, there are in modern criminal law several dissenting schools. The Talmudic conception however holds a position of its own. It adopts the principle of the so called "Willenstheorie" as distinguished from the "Vorstellungstheorie."[26] The Talmud requires *kawwanah*[27] to precede the wrong i. e. the consequences must be foreseen and desired by the wrongdoer so that the result forms the final purpose, the expected and desired consummation of the actus reus.

[24] Lehrbuch 16/17 Aufl. 1908 S. 157.

[25] Op. cit. p. 39.

[26] H. Lammasch op. cit. p. 28.

[27] נתכון=כונה, Kawwanah, is the generic term comprising both species of mens rea, viz.:

a) מזיד mězid, acting with Intention.

b) שוגג shogeg, acting with Negligence.

a) denotes presence of כונה; נתכון=מזיד being interchangeable terms.

b) denotes absence of כונה which ought to have been and could

c) אונס ones, Accident denotes absence of כונה which need not have and could not have been applied.

Hence *kawwanah* in Jewish Law may be defined as the intention coupled with the desire to do a certain act, knowing the consequences of the act to be illegal and punishable.[28]

As far as such knowing is concerned it is necessary that the malfeasant possess:

I. a knowledge, i. e. an understanding, of the act he is doing, of the surrounding circumstances, and a discernment of the objects affected by it. The German jurists call these requirements "Tatbestandsmerkmale". So e. g. in case of murder, the Talmudic Law requires the wrongdoer to know that the victim is 1) a human being איש *ish*, not an embryo[29] 2) an Israelite, ישראל, *yisraèl*[30] 3) a human being capable of living,[31] בן קיימא *ben kayyama.*

[28] Intention in English Law is less complex. It is based mainly on what Continental jurists call "die Vorstellungstheorie:" 'In case of an act considered without regard to its actual or possible consequences, intention consists solely of advertence i. e. cognisance of the material circumstances or facts surrounding the act and giving it its legal character or importance.

In case however, of an act considered as connected with a particular consequence, intention comprises not only advertence to circumstances already in existence, but also advertence to the consequence in question as a possible consequence, coupled with the expectation of that consequence as a probable one.'

It is often said that a man does or does not intend a consequence, when all that is meant is that he does or does not desire it. This is a wrong use of the word intention, though intention and desire do in fact correspond or accompany each other, in the vast majority of cases.

Motive or the Desire prompting a man's conduct is often of the utmost importance by way of evidence, in proving the existence of intention, but the two things are none the less distinct.' Cf. D. A. Stroud, Mens Rea, London 1914 p. 3ff.

[29] Lev. 24, 17.

[30] Cf. Kenny, op. cit. p. 124 (III) showing that 'murder' originally applied to the killing of only a Norman. Cf. M. Guttmann, Das Judentum und seine Umwelt, Berlin 1927, p. 36ff. that Jewish Courts, in Talmudic times, had no jurisdiction in cases involving the killing of Gentiles.

[31] Ad. (1) Niddah V, 2, cf. Babli, ibid. 45a, Baba Batra 142a. S. Rubin, Der Nasciturus als Rechtsobject, Z. V. R. XX. p. 119ff.

Ad. (2) Sanh. 78b.

II. a knowledge of the illegality of the act. This element comprises the knowledge of the anti-social or anti-religious character of the act; for only an act of this kind is prohibited by the Law. The objection, that it is impossible to know all laws, is met in Talmudical Criminal Law by the Institution of Forewarning—התראה, *hatra'ah*.[32]

III. a (general) knowledge of the punishability of the act. It is not required that the malfeasant know which particular mode of sanction is threatened for the crime he commits. It is enough if he knew e. g. that the act is punishable with death,[33] and not with מלקות *malḳot*, stripes. But he need not know the particular mode of death.

We see, therefore, that *kawwanah* in the Law of the Talmud is a complex of mental elements. It is a state of mind accompanying an act, and comprises—on the part of the malfeasant—

(a) Knowledge of the consequences of the act i. e. knowledge of the particular consequences[34] which he expects to arise as the result of his action;

(b) Knowledge of the circumstances accompanying the act;

(c) Knowledge of the illegality of the consequences;

Ad. (3) Mishnah Sanh. IX, 2; Tosefta XII, 5.; Sanh. 84b.; Niddah 44b.

Hence the killing of a person who is suffering from a mortal disease is not considered a capital crime. Cf. Aptowitzer *J. Q. R.* XV. p. 93 ff.

Similarly in case of forbidden food it is required that the offender know that a particular piece of meat is tallow, or in case of work forbidden on the Sabbath, that a particular day was the Sabbath (Maim. Hilkot Sanh. XII, 2).

[32] See post.

[33] See chap XVI 'Restitution (c) Involuntary.' Sanh. 8b: די בהתראת מיתה בכלל, ואין צריך להתרות באיזה מיתה נהרג. Maim. Hilkot Sanh. XII. 2. J. S. Zuri, Mishpat ha-Talmud. vol. VI, p. 15.

But cf. Jew. Enc. VI. 260. Article 'Hatra'ah,' where it is stated that unless the particular mode of death be mentioned the legal penalty to the crime cannot be imposed.

[34] Cf. Sanhedrin 79a. 'If Reuben and Simeon are standing before him and he says he intends and desires to hit R. and not S. and he does in

(d) Knowledge of punishability; all these elements, coupled with the desire and intention to bring about the consequences.[35]

The Institution of Forewarning—Hatra-ah[36]

The Talmud makes use of a peculiar and very original method of evidencing the presence of the complex *kawwanah*. It employs what is termed the institution of Forewarning, התראה *hatra'ah*, which provides that the malfeasant, before committing the actus reus, must have been warned by two legally recognized witnesses,[37] in such a manner that the four elements of the *kawwanah* (the fifth—desire and intention—does not enter here) be brought clearly to his mind, and that in answer to this forewarning he should have replied: יודע אני ועל מנת כן אני עושה 'I know it, and in spite of it I shall commit the wrong.'

It is only by means of this 'acceptance of the warning,' קבלת התראה, *ḳabbalat hatra'ah*, which must have been tendered in the manner mentioned, that the full *kawwanah* (including intention and desire) of the malfeasant manifests itself and may be used as evidence in a Court of Justice.

fact hit S., he is free of the crime of murder! This shows that the Talmudic Law requires 'Specific Malice' in such a case. See Kenny, op. cit. pp. 133.

But such knowledge does not comprise knowledge of legal consequences which he hopes and wishes to avoid.

[35] The definition of *mens rea* has been worked out in detail in the case of murder; with a few modifications, it can be applied to all other wrongs. See Z. Frankel, Der gerichtl. Beweis, Berlin 1846, p. 229 Anm.

[36] Sh. Ar. Ḥosh. Mish. 30; Maim. Hilkot Sanh. XII. ff; Cf. N. A. Nobel in J. Guttmann's Festschrift, Leipzig 1915, p. 143 ff; Isak Unna, R. Simon b. Lakisch, Frankfurt a/M, 1921, p. 16, and concerning התראת ספק, *hatra'at safek*, warning concerning a doubtful offence, Jer. Pesaḥim V. 32: Makkot 16a.

[37] But the warning by a woman, a slave, or even the warning of a person whom the malfeasant only heard but did not see and even if warned by the victim himself, is sufficient. Ḥosh. Mish. ibid. Maim. ibid. adds: 'Even the warning by some apparition!'

The institution of Forewarning is shown as a means to bring about the manifestation of the criminal intention. It is not a constitutional element of the crime, but indeed a very important formal requisite of the evidence of the actus reus. It is not part of the substantive, but of the adjective law.

Indeed, even in the absence of this formal forewarning the malfeasant is regarded a criminal, if the wrong be evidenced through witnesses or otherwise. But the difference in evidence results in a variation of the punishment, e. g. in the case of murder, כיפה *kipah* i. e. imprisonment at the discretion of the Court, is imposed instead of the sentence of death.

The purpose of forewarning is not only to draw the attention of the potential malfeasant to the illegality of his act הבחנה—*habḥanah*—(for if this were the only object, the forewarning would miss its purpose in the case of a *talmid ḥaḥam*, a person versed in the Law, in which case it is also required)[38] but it is required also to bring to light the criminal intent in its totality; in order to draw the wrongdoer's attention to the consequences of his act, to the circumstances of the case, and in order to effect the verbal acceptance by him of the Forewarning, the *ḳabbalat hatra'ah*; which, being part of the evidence to be placed before the Court, is also necessary in case of a person knowing the law.[39]

For the average person (not a *talmid ḥaḥam*) the institution of Forewarning fulfills the purpose of pointing out the illegality and punishability of the act. The statement of the Talmud[40] "Forewarning is necessary only in order to establish whether a wrong was committed intentionally and deliberately, or by negligence" has to be understood in the

[38] According to Maim. ibid. XII, 2.

[39] Frankel, op. cit. p. 224.

[40] Sanhedrin 8b לא נתנה התראה אלא להבחין בין שוגג למזיד.

sense mentioned. For the distinction between מזיד *mezid* and שוגג *shogeg*, intention and negligence, is based not on the presence or absence of the knowledge of illegality only, but of the complex knowledge comprised in '*Kawwanah*.'

Sometimes the actus reus itself is of such a nature as to manifest the intention of the malfeasant to the full, so much so that the forewarning is not required: *Res ipsa loquitur*. For instance, in the case of 'breaking in.' Here the act itself manifests the complete mens rea of the offender. מחתרתו זו היא התראתו *maḥtarto zu hi hatra'ato*. For as Rashi says: 'Inasmuch as he has gone to the extent of risking his life, he has obviously done so in full expectancy of the fact that, should the owner oppose him, he would kill the owner.' It is therefore lawful to kill the breaker-in without warning.[41] The same applies to the case of threatened felonious assault.[42]

Hatra'ah is necessary only in case of wrongs the commission of which is threatened with the sanction of death or מלקות '*malḳot*,' stripes.[42a]. Such sanctions are of a punitive character, and therefore necessitate the presence of the full mens rea, which can be ascertained only through *hatra'ah*.[43]

B) Wrongdoing by Negligence

The second great subdivision of *mens rea* consists not in an activity of the mind, but rather in a culpable passivity of the malfeasant's attention, i. e. (a) either in the culpable

[41] Ibid. 72b. Cf. M. Hyamson, Mosaicarum et Romanarum legum collatio, Oxford 1913, p. 95.

[42] Sanhedrin 73a; Steinberg, op. cit. 142; Vogelstein, "Notwehr nach mos. talm. Recht." in Monatschr. für Gesch. und Wiss. des Judentums Bd. 48 p. 534; but the defence must be reasonable according to circumstances. Sanhedrin 74b.

[42a] Baba Meṣia 109a.

[43] Ḥosh. Mish. 30.

absence of knowledge of the four essential elements of *kawwanah* or (b) in the erroneous knowledge of these elements. In the first case the knowledge could have and ought to have been procured, in the second the knowledge ought to have been and could have been correct.

This defect in knowledge refers either to *ignorantia juris* i. e. to ignorance of the illegality of the act and of its punishability, or to *ignorantia facti* i. e. to ignorance of the intrinsic connection between an act and its consequences.

Both these forms of ignorance in Talmudic Law fall under the term שוגג *shogeg*.

In modern Law the question as to the possibility for the wrongdoer of acquiring the necessary knowledge, and consequently the fixing of his guilt, is left to the discretion of the judges, who decide the question according to the circumstances of the particular case.

The Talmud however endeavours to establish external and generally applicable indicia which, if present, would be taken to evidence the possibility for the malfeasant of repairing the defect in his knowledge of the elements of *kawwanah*.[44]

If the acquisition of such knowledge be impossible, the case falls under the head of accident אונס *ones*. This impossibility is not an objective test, but refers to the impossibility on the part of the defendant to acquire the knowledge (subjective test). Such a case of pure negligence

[44] Cf. Kohler Z. V. R. XX. p. 229 ff. Darstelling des talm. Rechtes.

NOTE: In the preceding discussion of mens rea it has been supposed that the offender has the power of volition i. e. that he must be able to 'help doing' what he does. This faculty is absent in persons who are asleep or are subject to physical compulsion—vis absoluta—or to duress by threats—vis impulsiva—or whose conduct is due to accident; it is also absent in insanity, complete drunkenness and infancy.

is cited in Deut. 19, 5. If a man is killed in the wood by a negligent woodcutter, the malfeasant is to be punished with exile.[45]

III

ACTUS REUS

A. The Definition of Theft and Robbery

Maimonides' definition of theft[46] is based on an account in the Talmud illustrating the clandestine character of *genebah*, as opposed to the open and violent taking by a robber.[47]

„אי זהו גנב? זה הלוקח ממון אדם בסתר ואין הבעלים יודעים, כגון הפושט ידו לתוך כיס חברו ולוקח מעותיו ואין הבעלים רוצים, וכן כל כיוצא בזה. אבל אם לקח בגלוי ובפרהסיא בחוזק יד אין זה גנב אלא גזלן. לפיכך לסטים מזוין שגנב אינו גזלן אלא גנב, אף על פי שהבעלים יודעים בשעה שגנב".(48)

[45] אונס, *onēs*, in the Talmud can best be explained by reference to the four elements of *kawwanah*. In the case of vis absoluta it precludes the possibility of actus reus (impossibility of volition); in the case of vis impulsiva it precludes illegality; in case of the impossibility of knowing the consequences of the act, it precludes guilt. Shebu'ot 26a.

[46] Maimonides, Hilkot Genebah, I. 3. (This definition was afterwards adopted by R. Jacob b. Asher in his code the "Tur," and by R. Joseph Caro, in his code the "Shulḥan Aruk.") Ṭur and Shulḥan Aruk Ḥoshen Mishpat 348, 4.

[47] Baba Kamma 79b.

[48] From the "Leḥem Mishneh" (Commentary to Maimonides by R. Abraham de Boton of Safed, 16 cent.) it appears that this is the correct text. Both the "RABeD" (R. Abraham b. David of Posquieres, 12 cent., author of critical annotations on Maimonides) and the "Maggid Mishneh" (Commentary on Maim. by Don Vital di Tolosa, Spanish Rabbi of 14 cent.) had before them a corrupt variant. The former's attack on Maim. and the latter's defence were due to the copyist's error. "It is a slip of the pen and neither the author's nor the corrector's fault and therefore ought to be corrected according to my version, which is based on MSS." Cf. "Migdal Oz" (commentary on Maimonides by R. Shem Tob Ibn Gaon, of Spain, 14 cent.) ibid.

"A thief is one who takes moveable property from another clandestinely and without his knowledge e. g.[49] if one puts his hand into another's pocket and takes his money without the owner noticing it, or similar cases. But if the taking occurs openly and in the presence of others and is done forcibly, the taker is a robber and not a thief. Hence, even if the taker be armed (i. e. prepared to take by force, if necessary), and the owners should notice the taking (e. g. see it from their home, but are afraid to leave it because the taker is armed), it is theft when the taker tries to hide his act."[50]

From this it follows that according to Maimonides two elements must coincide to make the taking a robbery:

A. The owners must be present.

B. The act must be done openly, the robber adopting no means of hiding it.

The practical difference between these two forms of wrongful taking (theft and robbery) appears in the punishment imposed. Whereas the sanction for the commission of theft is the restitution by the thief of the double value of the object taken (or if an animal was taken the four or five-fold value),[51] the sanction in the case of robbery amounted to the restitution of the principal only. In both cases, should the wrongdoers be unable to pay the required compensation, they could be sentenced to work for the owner[52]—under the Court's supervision—for such a time[53] as

[49] As far as the thief is aware the theft is being done without the owner's knowledge.

[50] Ibid.: כיון דקא מטמרי מנייהו גנב הוא Because he tried to hide himself, he (the armed taker) is considered a thief.

[51] Exod. 22,3 and 21,37.

[52] Ibid. 23,2 . . . . . (he shall make restitution); if he have nothing, then he shall be sold for his theft ונמכר בגנבתו. He could be "bought" only from the Court and could be made to serve in Palestine only (Cf. Josephus Ant. XVI, 1). A woman could not be sold in any case (M. Sotah 3, 8).

[53] Shebu'ot (end of Perek שבועות הדיינים); Maim. Hilkot Genebah 3, 12.

was considered equivalent to the value of the objects taken, (but not to work off the sanctions; these, however, remain a debt to be paid as soon as the thief's fortune increases) and there were also other disabilities attached to it.[54]

The reason for this differentiation is explained in the Talmud:[55]

שאלו תלמידיו את רבן יוחנן בן זכאי: מפני מה החמירה תורה בגנב יותר מגזלן? אמר להן זה השוה כבוד עבד לכבוד קונו, וזה לא השוה כבוד עבד לכבוד קונו.[56] כביכול עשה עין של מטה (euphem. for מעלה) כאילו אינה רואה, ואוזן של מטה כאילו אינה שומעת, שנאמר הוי המעמיקים מה' לסתר עצה והיה במחשך מעשיהם וגו'.

"The disciples questioned R. Joḥanan B. Zakkai: Why does Scripture deal more severely with the thief than with the robber? He answered them: Because the robber puts the honour of his Creator on the same level with that of his servant, while the thief did not do so, but on the contrary considered the eye and ear of Heaven as if it would not see and hear; as it is written,[57] 'Woe unto them that seek deep to hide their counsel from the Lord, and their works are in the dark, and they say, 'Who seeth us and who knoweth us?' "

In other words, according to the Talmudic interpretation, the robber's crime is an open one since he fears neither God nor man, whilst the thief fears man, but not God, thinking that if he sinned secretly the All-seeing Eye would not behold him.[58]

However, the real reason for the differentiation appears to be that the clandestine taking by means of *genebah* was considered more dangerous to the community at large, as it

[54] See 'Involuntary Restitution', chap. XVI (c).

[55] Baba Kamma 79b.

[56] Levy J., Neuhebr. und Chald. Wörterbuch. Vol. II, page 240 sub יכול.

[57] Isaiah 29, 15.

[58] Cf. Rashi (R. Shelomo Izhaki, b. 1040, d. 1105, Troyes, author of commentary on Talmud) Baba Kamma 79b.

was hard to guard against it, while it was easier to guard against the violent taking of robbery which was committed openly.[59]

B. The Taking

(a) by a Non-Possessor

In order that the taking should amount to the physical part in the commission of the crime—the so called *'actus reus'*—it is required that a change of physical possession take place in the form of one of the modes of acquisition, *ḳinyan*, operative in a bargain and sale of moveables.

Whereas in a bargain and sale the physical movements of the acquiring party are done with the consent of the selling party and thus both *actus* and *consensus* unite in making the transaction legal, in the case of theft the taker completes his act without the knowledge, and hence without the consent, of the owner, making it an illegal performance.

It is only when the taker's act is physically identical with one of the modes of *ḳinyan* that the law regards him as having completed his *actus*, the change of possession, to make him liable for theft. It is therefore necessary that the

[59] According to Frankel, robbery occurred very rarely; hence the sanction of simple restitution was considered sufficient.

Cf. S. R. Hirsch, Der Pentateuch übersetzt und erläutert. Zweiter Teil: Exodus, p. 260, "Robbery is violent taking (cf. 2 Sam. 23,21; B. Kamma 79b); theft is clandestine taking. The robber seizes property which is under the personal protection of the owner; the thief takes property which is protected by general respect shown for the law. Therefore robbery is a (simple) offence against the individual right of property; theft is a double crime, inasmuch as it is an offense both against the individual right of the owner and against the universally recognized sanctity of property, a principle in which the owner was justified in putting his trust during his absence . . . . . The thief therefore pays to the owner as compensation the value of the article stolen, and in addition the same amount as punishment for his offence against the 'allgemeine Rechtsachtung.' The thief himself being a member of the community at large, the property was put also under his protection, and instead of protecting it he took it."

thief do an act amounting to one of the legally recognized modes of *ḳinyan*. There are six such forms of *ḳinyan*,[60] only

[60] Moveable property in case of buying and selling can, according to Talmudic Law, be acquired in one of six ways:

A. *Hagbahah* הגבהה, explained in text.

B. *Meshikah* משיכה, explained in text.

C. *Mesirah* מסירה, tradition (Cf. Ḥoshen Mishpat, 202, Hilkot Mekirah 3, 8). This mode of acquisition consists in the transfer of possession i. e. in the actual delivery of an article by one party to the other, the latter grasping the article without moving it from its place; or in the delivery of a part of the article or a substitute symbolizing the article to be transferred e. g. cord to lead the animal. (Constructive tradition).

Constructive tradition is the mode of acquisition par excellence in case of bulky objects that cannot be subjected to either *hagbahah* or *meshikah* in order to remove them to a place controlled by the acquiring person e. g. a ship. Also *mesirah* is used in places where *meshikah* would be ineffective e. g. in a public place.

Mesirah is effective only in a public place or in a place not belonging to either party.

D. *Ḳinyan Sudar* קנין סודר (Ḥosh. Mish. 195). This mode of acquisition (based on Ruth 4, 7 שלף איש נעלו ונתן לרעהו) applicable in case of both immoveable and moveable property, except coins, consists in the symbolical tradition by the acquiring party (the buyer or donee) of an article of wear, a vessel or any other article which is his property, to the transferring party (seller, donor) as a substitute for the consideration agreed upon. The acquiring party would usually say to the other party: 'Acquire ownership in this article in exchange for the field or the moveable article which you sold or gave to me.' But even a silent acceptance is sufficient. As soon as the seller or donor has acquired the article by *hagbahah*, etc. the ownership of the thing to be transferred is vested in the acquiring party (buyer or donee) wherever it may be.

E. *Ḳinyan Ḥaṣer we-'arba amot*, קנין חצר וארבע אמות explained in text.

F. *Ḳinyan Agab Ḳareḳa* קנין אגב קרקע (Ḥosh. Mish. 200), in which case we have a *ḳinyan* of moveables by means of acquiring the immoveables with them at the same time (deduction from 2 Ch. 21, 3 ויתן להם אביהם מתנות רבות לכסף ולזהב ולמגדנות עם ערי מצורות ביהודה: "And their father gave them great gifts, of silver, and of gold, and of precious things, with fortified cities in Judah." from which it follows that he gave them the moveables by means of the land of the fortified cities). If Reuben sells or donates immoveables and moveables to Simeon, and Simeon acquires the ownership in the immoveables by one of the recognized forms of acquisition, he also acquires eo ipso the ownership in the moveables wherever they might be located at the time. But if the moveables are not deposited on the land, an overt act is

two of which (or three, if the "constructive taking" thru חצר *ḥaṣer* be included here) apply in the case of theft which presupposes the furtive taking of an article, a condition obviously absent in the case of a physically two-sided transactions.

The modes of *ḳinyan* applicable to theft are:

A. הגבהה, *Hagbahah*, in which case the acquiring party lifts up the article to be acquired with his own hands or through his own efforts.[61]

This is an effective mode of acquisition wherever performed, whether in the original owner's house, his רשות, *reshut*, or "legal possession," (regarded in law under his complete control,) or in a public thoroughfare e. g. a market place.

By this mode of *ḳinyan* the law regards the article transferred to the legal possession of the person lifting it up.

B. משיכה,[62] *Meshikah*, the act of drawing or pulling an article (or in the case of an animal riding on it or inducing it to go e. g. holding it by the halter) from the possession of another to one's own place of control;[63] or to one's place

required of the seller by having him say קנה מטלטלים אגב קרקע: I wish you to acquire those moveables by means of this land. Ḳiddushin 26b ff. Coins can also be acquired by this form of *ḳinyan*.

Apart from the respective acts done in accordance with the six modes of kinyan outlined above, in order to acquire the ownership in the articles concerned an absolutely essential element must accompany them, viz. the intention of the parties to give and take dominion (So according to the Roman Law, Digest 41, l. 43).

[61] Maimon Hilk. Mekirah 3, 8; Ḥosh. Mish. 197.

[62] Ḥosh. Mish. ibid. Maimon. ibid.

[63] According to Rab (Baba Batra 75b) the act of *meshikah* is finished as soon as the article has been partly removed from the place which it occupies; according to the authoritative opinion of Samuel, however, a complete removal from the place it occupied to a place under the person's control (or joint control) is necessary. (Maim. in Hilkot Mekaḥ Umemkar 4, 4 says, "In order to acquire an article by *meshikah* from a public place to a private place, i. e. to a place under the acquiring party's control, a partial removal of the article (—not removal of part of the article—) from the public place is effective." Maimon. thus, seems to

controlled jointly by him and his partner; or to a place the owner of which gave him license to deposit the article there; or to a סימטא *simta* (side alley). *Meshikah*, unlike *hagbahah*, would not be effective in a public place which is the common property of all and therefore cannot be regarded as being under the control of a particular individual.[64]

C. קנין חצר וארבע אמות.[65] *Ḳinyan Ḥaṣer we-'arba' 'Amot.* This mode of acquisition[66] presupposes that moveable property be deposited in the חצר *ḥaṣer*, yard, i. e. house or field or any other space, owned and controlled by the acquiring party.[67] If the transferring party is aware of the whereabouts of the moveables and sells them to the other party, the *ḥaṣer* acquires the moveables for the buyer i. e. no further mode of acquisition is necessary. According to some authorities a space of four square yards is taken to be under the control of a person anywhere and acts of *ḥaṣer*.

If an object e. g. an animal entered the thief's controlled possession, his *ḥaṣer*, and he intended to steal it, he does not become a thief by this guilty intent alone until his own actus reus supply the necessary physical element, and he brings the object "constructively" into his possession, e. g. if he locks the door of the *ḥaṣer*.[68]

side with Rab. The *Aruk ha-Shulḥan* to §197, offers a solution of the difficulty.

[64] This principle of the change of possession as a preliminary to the completion of the actus reus is developed to an extreme. If a thief slaughtered and sold an animal while yet within the owner's "possession," he is free of *kefel*, double compensation. M. Baba Kamma VII, 5, 6.

[65] Ḥoshen Mishpat 200.

[66] A man's possession is constructively his "hand;" Num. 21, 26, ויקח את כל ארצו מידו hence, his possession acts as his "hand" in acquiring moveables.

[67] In the same way if the *ḥaṣer* was merely rented by the acquiring party, moveables located there would become his property without any other *ḳinyan* being necessary, the *ḥaṣer* being considered in law as his possession.

[68] Ḥosh. Mish. 348, 4; Keṣot ha-Ḥoshen ibid.

(b) by a Possessor, Bailee, through an Act of Conversion

In case of a non-possessor, in order that the actus reus of *genebah* should be committed, a change of possession is essential. The thief's conduct must be such as to render him possessor of the article by means of one of the recognized modes of *ḳinyan*.[69]

But it is different in the case of a bailee.

Bailment is a delivery of a thing on a condition, expressed or implied, that it (i. e. the identical thing delivered) shall be restored to the person delivering it, or dealt with according to his directions as soon as the purpose for which it has been delivered has been fulfilled.[70]

The bailment *κατ' ἐξοχήν* of the Jewish law is the *piḳadon*[71] פקדון. It comprises not only the depositing

[69] See ante 'Taking, by a Non-Possessor.'

[70] Cf. M. Baba Meṣia Chap. III, VIII, and part of VI; William's Personal Property 17th Edit. p. 56.

[71] To constitute a *piḳadon* there must be:

A. Delivery of possession.

I. Actual, i. e. the bailee must acquire the possession of the bailment by one of the recognized modes of *ḳinyan* (See ante).

II. Constructive—by means of קנין סודר *ḳinyan sudar*, which consists of the symbolical tradition of a thing by the acquiring party as a substitute for the consideration agreed upon (see ante). It transfers the ownership or (in case of bailment) possession of a thing wherever it may be.

Baba Mesia 99a and Maim. Hilkot Sekirut 2, 8 : אמר ר' אלעזר כדרך שתיקנו משיכה בלקוחות, כך תיקנו משיכה בשומרין "Just as apprehension of the article by משיכה has been made a necessary element in the contract of bargain and sale, so also in the case of bailment apprehension of the article has been ordained." The Talmud and the Roman Law regard the bailment as a "Real" contract in which the consent of the parties is proved by one contractor parting with property or possession of a thing in exchange for which the other party in most cases obliges himself to return it. (The Real contract of the Roman law comprises also the *Mutuum* or Loan of Money, *Pignus* or pledge, and the so-called *Innominate contracts*. But see opinion of the ר"י. (R. Yiṣḥak b. Samuel of Dampierre, 13 Cent.,) who regards the bailment as Consensual contract. Cf. Tur Ḥosh. Mish, 303, 1.

but also the hiring and borrowing of chattels. The bailee or שומר *'shomer,'* unless he be so authorized by the owner of the thing bailed, is not entitled[72] to make use of the bailment. (In Roman Law 'furtum usus'). Conversion—שליחות יד *sheliḥut yad*—of the bailment is equivalent to robbery and increases the degree of responsibility of the bailee to make him liable for loss of any kind, even by accident.[73]

Conversion consists in the doing by the bailee of an act that would be legally recognized to vest ownership in the acquiring party in the case of bargain and sale. It consists in the taking possession of the bailment by lifting it up or

As soon as the *pikadon* is delivered neither the bailee nor the bailor (when the bailee is a שומר שכר, bailee for reward) can withdraw from the contract.

B. The bailment must be a moveable thing. Cf. Shebu'ot 43a.

C. There must be a contract of bailment.

I. Express, where a person, by means of an express contract, agrees to the safekeeping of another person's goods which have been delivered into his possession.

II. Implied, where a person tacitly undertakes this duty as an implied result of another contract. In other words, a bailee, שומר, in the Talmud comprises not only the depositary but also the hirer and the borrower.

The bailee is required to undertake the obligation of keeping the article bailed in safe custody. This undertaking need not be given in express terms; it is sufficient if, from his words or actions, it can be clearly deduced that he undertakes this obligation, e. g. if the bailee says to the bailor, "Put the thing before me." (Baba Meṣia 80b and Maim. 1. c.). But, if he said, "Put it before you or put it down" he is not understood to agree to a contract of bailment. Cf. English case of Howard and Harris, 1884, IC & E, 253, where defendant was held not liable for loss of MS of a play which had been sent to him without invitation.

[72] S. R. Hirsch, in his Commentary to Exodus p. 272, deduces it from the phrase מלאכת רעהו (derived from מלאך, something that can be sent, that can be made use of = messenger) which he translates as "that which is disposable by your neighbor;" hence he has "put his hands" into his neighbor's property by unjustifiedly using it. Although entrusted to his care, the disposition, the right of using it, is vested in the owner.

[73] Tur Ḥosh. Mish. 292; Baba Meṣia 41a.

drawing it away from its place with the intention of either appropriating even a part of it, לגוזלו *le-gozelo*, or using it in such a way that would decrease its value. The mere taking of the bailment with such an intention (although that intention has not been consummated) imposes on the bailee the increased liability. If, however, the use of the bailment does in no way decrease its value e. g. in case of a ladder, then only the actual use and no other acts makes the bailee liable.[74]

But the mere intention of the bailee to take a bailment for himself, even when he makes such a declaration before witnesses, does not constitute conversion.[75]

Baba Meṣia Chap. III, Mishnah 12, furnishes a typical case of conversion. "If the bailee has bent down the cask which was stored with him and taken a quarter of a lug of wine therefrom, and thereafter the cask was broken accidentally, he must pay only for the quarter which he has actually converted." The reason for this is that his act (being neither משיכה *meshikah* nor הגבהה *hagbahah*) does not amount to one of the forms of *ḳinyan* to make him guilty of conversion and therefore responsible for the accident.

"But if he picks up the cask and takes a quarter of a lug of wine therefrom and thereafter it was broken accidentally, he must pay for the entire value of the cask." In this case he performed one of the modes of *ḳinyan*, and it is implied that his intention was to convert it to his own use, if he uses part of it; he is therefore liable for the accident. But it is not

[74] Cf. אם לא שלח ידו in Exod. 22, 7 to Est. 8, 7 על אשר שלח ידו ביהודים; שלח יד in both cases indicates hostile intentions not consummated. In English Law conversion must be quite "inconsistent with bailment" see Kenny, Crim. Law. p. 191.

[75] This is the prevailing view of the school of Hillel. Bet Shammai hold that mere words conveying the intention of conversion are sufficient. The latter take Ex. 22, 8 על כל דבר פשע in the literal sense, "every word of trespass."

necessary that he should have actually appropriated any part of the bailment.[76] If he just lifted up the cask or moved it towards him for the purpose of taking only the slightest amount, he is liable for the whole although he actually has not taken anything from it. Maimonides is of the opinion that this rule applies only to homogeneous bodies in toto, but not e. g. to a bag of apples or coins; in the latter case the taking of a few coins or apples would not make the taker liable for accidental loss of the whole.[77]

If the bailee has bent down the cask and has taken wine therefrom and the wine in the cask became sour he is responsible for both the wine he took and the sour wine in the cask. Though he has not performed one of the modes of *kinyan*, yet the acidity of the wine in the cask is a natural consequence of his act and he is therefore liable.

In the preceding cases the taking occurred without a claim of right. If, however, the bailee converts the bailment on a counterclaim for an unpaid debt against the bailor, the author of the SHaK[78] doubts if this is conversion

On the other hand, Rabbi M. Epstein in his "*Aruk ha-Shulḥan*"[79] maintains that it is the accepted opinion that conversion is a wrong, even if a bailee intends paying for it. Therefore, though one might agree that he had a right to withhold the bailment until his case came up before the Court, he had no right to convert it to his own use; but if he should have lifted up the bailment with the intention of

[76] In the case of a bailment that does not depreciate through use, only actual use makes the bailee liable for conversion. Mere הגבהה would constitute שאלה שלא מדעת *She'elah shelo mida'at* (cf. Baba Meṣia Chap. III, Mishnah 9) which is equivalent to גזלה *gezelah*, robbery.

[77] Hilkot Gezelah 3.

[78] SHaK ad Ḥosh. Mish. 292. (SHaK—Sifte Kohen—Commentary on Shulḥan Aruk Ḥosh. Mish., by R. Sabbathai b. Meir ha-Kohen (17 Cent.).

[79] Compendium of Jewish law in the form of a running Commentary to the four parts of the *Shulḥan Aruk*. § 292, 11.

appropriating part of it, without however doing so, he is not guilty, inasmuch as he honestly thought he had a claim of right in keeping the bailment in satisfaction of the money due him from the bailor.[80]

The absolute prohibition for the bailee to make use of the bailment entrusted to him has been relaxed in the case of a deposit of coins to a banker.[81]

The banker is regarded in law as a bailee for reward, although in fact he might be a gratuitous bailee.[82] The

[80] As seen before, an act of kinyan (lifting or moving the article) for the bailee's unlawful use thereof constitutes '*sheliḥut yad*' and makes him liable for accidental loss. But if the article was removed by him for its greater safety, and, while being removed it was accidentally destroyed, or if the removal was neither for his own benefit nor for the benefit of the article but because he needed the place where the bailment was deposited, this is not regarded as *sheliḥut yad*, for he had no intention with reference to the bailment itself, and therefore he is not responsible for accidental loss but only for negligence. M. Baba Mesia 3, 9.

But if, after having been so removed, an accident happens to the bailment, whether the bailee is liable or not depends on whether or not there was originally an express contract between him and the bailor to keep the bailment in a particular place. If the contract had so stipulated and he removed the article, he is liable as he performed an act incompatible with his contract; his conduct ab initio was wrong in changing the assigned place; he himself increases his liability, the accident being a direct result of his act. If, however, the bailor had not assigned a specific place for the keeping of the bailment, the bailee is not responsible if it had been destroyed by accident after it had been removed, for he had not broken his contractual obligation by removing it. (Cf. the following commentaries to Sh. Ar. Hosh. Mish. 292, 6: ReMA—R. Moses Isserles, 16 Cent. in his commentary on Caro's Shulḥan Aruk called "Mappah" 'Table Cloth,' BAḤ—the "Bayit Ḥadash" commentary on the Ṭur by R. Joel Sirkes 17 Cent.; and TaZ —Ṭurĕ Zahab, a commentary on all parts of Sh. A., by R. David b. Samuel ha-Levi 16 Cent.).

[81] In the absence of a condition to the contrary, or if it had not been deposited in a bag sealed or tied in such a way as to clearly show that the depositor's intention was not to permit its use. Baba Meṣia ibid.

[82] On the same principle the Talmudic Law treats of persons who, though they receive no monetary compensation for the safekeeping of an article, derive benefit from the fact or transaction which brought the article into their possession. Thus, e. g. the finder of an article is regarded as a bailee for reward, because, while occupied in ascertaining

reason for this is the fact that since in the ordinary course of business the banker is authorized by the bailor to use the moneys deposited with him ("depositum irregulare" of Roman Law), this privilege is regarded as valuable consideration, imposing upon him all the responsibilities of a bailee for reward, whether he actually makes use of the money or not.[83]

But if the banker actually uses the money, he assumes the position of a borrower, who is liable even for accident. His liability starts as soon as he has appropriated even the smallest coin, and continues, even after he has restored it to its former place of deposit, until he returns the money to the bailor.

In case of money deposits the bailee need not repay the bailor the identical coins bailed, even if the original coins are still in his possession.[84]

Not only is the bailee responsible for his own acts of conversion, but if he told an agent e. g. his servant, to

the owner, he is legally freed from the fulfillment of other religious duties involving expense e. g. from giving charity (Baba Kamma 56b according to R. Joseph; so Maimonides, Hilkot Meṣia 13, 10.). Similarly e. g. a laborer, who has by law a lien on the article given to him for repairs i. e. has the right to retain it until he has been paid for his work, is regarded a bailee for reward (Baba Meṣia 80b Mishnah and Gemara; also M. Baba Kamma IX. 3, 4.

[83] Baba Meṣia 43a; Maim. Hilkot Milvah u-Piḳadon 7, 10.

[84] Cf. *Nesibot ha-Mishpat* to Ḥosh. Mish. 392, 13. In English Law the same rule holds good. Thus in Regina v. Hassel, C. C. R. 1861 (Leigh and Cave 58) it was held that a treasurer of a money club, who is under no obligation to return to the members the specific coins entrusted to him, could not be convicted of the offence of larceny by a bailee when he had fraudulently appropriated some of the monies entrusted to him. So also the depositum irregulare of the Roman Law (Digest 19, 2, 31), "Nam si quis pecuniam numeratam ita deposuisset ut neque clausam neque obsignatam traderat, sed adnumerarit, nihil aliud eum debere, apud quem deposita esset, nisi tantundem pecuniae solvere" = "If money were deposited unsecured by key, seal or other fastening, it was presumed to be a depositum irregulare i. e. the depositary became its owner and can only be bound to return a similar quality and quantity"

convert the bailment, and he did so, the bailee is liable. This is an exception to the rule אין שליח לדבר עבירה *en sheliaḥ li-debar aberah* that there is no agent recognized in the commission of wrongs, but that everybody is responsible for his own acts.[85] The School of Hillel deduces this from דבר פשע[86] *debar pesha'*, every "matter of trespass" which it interpreted as every "word of trespass."

There is however a difference of opinion on this point. Some authorities hold that the bailee is liable for the acts of his agent acting under his instructions only when the agent is unaware of the article being a bailment, or when he is a minor.[87]

We have seen that the original meaning of the term *genebah* consists in clandestinely or stealthily taking something without the knowledge of the owner. This principle was considered large enough to embrace not only cases in which the change of possession was wrongful ab initio but also where the article, as in the case of the bailee, came lawfully into the possession of the present holder.

If the bailee afterwards claims that the article has been stolen from him,[88] טוען טענת גנב *to'en ta'anat ganab* he must take an oath[89] to rebut the presumption of bad faith. If then, after having taken the oath, he is convicted of perjury by witnesses, who testify to the presence of the bailment in his possession, he is regarded as a *ganab* and must pay '*kefel*' (double punitive damages) to the owner. If, however, he claims that the article bailed has been lost

[85] Sanhedrin 29a; Jastrow, Talm. Dict. s.v. שליח.

[86] See D. Hoffman, Mishnaiot, Baba Meṣia III. p. 61. Note 72.

[87] See chap. XVI (c) 'Monetary Punishment'; *Derishah U-pherishah* (Commentaries on Tur Ḥosh. Mish. by R. Joshua Falk, 16 Cent.) to § 292.

[88] מודה במקצת *modeh be-miḳṣat.* The principle regarding מ"ב is deduced from Scriptures, Exod. 22, 8. cf. Baba Mesia 3a; Shebu'ot 39b; also Naḥmanides to Exod. 22, 8.

[89] See post note (91).

(or in case of an animal that it has died), he is, on conviction, liable only for restitution.[90]

We have seen that in case of *genebah* by a non-possessor, the *mens rea* is manifested by some overt act consisting in the taking away of an article from the possession of its owner; in the case of the טען טענת גנב *to'en ta'anat ganab* the requisite overt act consists in taking the oath.[91] If the bailee perjures himself he is regarded a *ganab* from the moment of his taking the oath. But if he said לא היו דברים מעולם *lo hayu debarim me' olam*, i. e. if he denied the whole affair, or החזרתי לך *heḥezarti lak*, i. e. if he admitted the bailment but pleaded return, and afterwards witnesses to the contrary appear, his liability is increased to accidents and his evidence is inadmissable; so is his oath.[92]

[90] Baba Kamma 63b טוען טענת אבידה בפקדון פטור מכפל. S. R. Hirsch explain this difference by saying that the טוען טענת גנב has been convicted of the grossest offence against the confidence reposed by man in the law by pretending on oath to have left the bailment under the protection of the law at the very moment when he himself commits the greatest wrong against the right of ownership protected by that law. (Ad Exodus 27, 8, p. 276). Tschernowitz (Shiurim be-Talmud pp. 76 ff) regards טוען טענת גנב as the more serious offence because the bailee by setting up the plea of theft deliberately closes the door to repentance. He cannot return the bailment to the owner without a confession of his own guilt; for if he should claim to have found the thief it would necessitate his summoning the thief to Court to claim the *kefel*. But when he pleads the loss of the bailment, his path to repentance is still open without necessarily admitting his guilt; for he is still at liberty to say that he found the bailment. Also, in case of loss the owners have not given up all hope of recovering the bailment, and therefore he has at least ultimately a chance of making good.

[91] Both in case of טוען טענת גנב and טוען טענת אבידה the bailee is required to take an oath:

1. That he has not committed a breach of duty, i. e. has not been negligent in guarding the bailment שלא פשע בה (for this the שומר שכר substitutes: that it has not been stolen or lost, but that it was an accident).

II. That he has not committed conversion שלא שלח בה יד.

III. That the bailment is not in his possession שאינו ברשותו. Cf. Rashi beg. of B. Mesia III. The points I and II have been imposed by גלגול. See H. Goldin op. cit. on Oath of Adherence, p. 156. Cf. also D. Hoffman, Mishnaiot, Nesikin, p. 238.

[92] See Aruk ha-Shulḥan 293, 10.

Note A

Bailments in Talmudic Law

The Talmud divides bailments into four classes: (Cf. Exod. 22,6–14 for four kinds of bailments: v. 6–8 refer to שומר חנם gratuitous bailee; v. 9–12 to שומר שכר, bailee for reward; v. 13–14a to שואל borrower; v. 14b to שוכר hirer).

A. Bailment of a שומר חנם, *shomer ḥinom* i. e. a delivery of chattels to be kept for the use of the bailor without reward.

The gratuitous bailee agrees tacitly to guard the thing entrusted to him with reasonable care, and he is liable for the want of care which every prudent man would, under the circumstances, take of his own property. This want of due care is called פשיעה, *peshi'ah*.

It is assumed that occurrences like theft and loss can be guarded against by the use of an average degree of diligence.

The inability on the part of the bailee to return the bailment to the bailor, establishes a prima facie case of neglect of duty on the part of the bailee. If he claims that the article entrusted to him was either stolen or lost or that it had been destroyed by an occurrence of similar type and that it was not due to carelessness on his part, he must take an oath to substantiate his defence. The oath rebuts the prima facie case and no more evidence need be produced by the bailee in order to be exempt from liability. But, if he claims there were witnesses present, he must produce them to corroborate his defence; the oath will not free him. (Ḥosh. Mish. 294; B. Meṣia 93a.)

B. Bailment of a שומר שכר, *shomer sakar* in which case we have a bailee for reward who tacitly undertakes to guard

the bailment personally and continually. He therefore is liable to compensate the owner as soon as he left the object of the bailment and deprived it of his personal protection, if as a result of this neglect it be stolen, though it was kept in good custody. (Cf. B. Meṣia 93b where the Gemara states "The bailor paid the bailee a reward in order that he should protect the bailment with נטירותא יתירתא *netiruta yeterta*, particular (personal) care." Cf. also Hosh. Mish 303, 11. re שמירה מעולה, *shemirah me'ulah* Cf. S. R. Hirsch, (Exodus, p. 270,) who shows that these provisions are deducible from the text). Though the bailee for reward is liable in case of theft and loss, he is not responsible for accidental loss, against which he could not have guarded by the degree of diligence expected of him. As in the case of the gratuitous bailee, he must take an oath to rebut the prima facie presumption of culpable negligence.

C. Bailment of a שוכר *soker*, Locatio rei, where chattels are lent to the bailee to be used by him for hire. His liability is the same as that of a bailee for reward.

D. Bailment of a שואל *sho'el*, Commodatum, where chattels are lent to the bailee gratis to be used by him. In this case, as the bailment is for the benefit of the bailee alone, he is held to be liable for loss from whatsoever cause, i. e. even in the case of accident. The only case where a borrower is not liable is either where the owner of the bailment was employed by the borrower when the loan was effected (B. Meṣia Chap. VIII, Mishnah I), or where the destruction of the bailment has resulted from the very kind of work for which it had been borrowed, provided it had not been taxed beyond its strength (B. Meṣia 96b) cf. Hyman F. Goldin, Mishnah Baba Meṣiah, 145ff.

Note B

Diligence in Jewish, Roman, and English Law

The degree of diligence required of bailees is not the same in all cases.

The Bible clearly recognizes various degrees of negligence cf. Note A. ante. The Indian Law puts all bailees on the same footing. The early English Law (Common Law), which was laid down in the famous Southcote's Case 10 Eliz., held that goods bailed were absolutely at the risk of the bailee; although it was usual in a claim against the bailee to allege negligence, "tam negligenter custodavit," this was mere form. Holt J. C. in Coggs v. Bernard 1704, finally overthrew the doctrine of the bailee's absolute liability, except where there was a common occupation, e. g. Carriers and Innkeepers or an express contract.

With reference to the degree of diligence incumbent upon the bailee, a distinction is made in *the Talmud* according to the degree of benefit which the bailee derives from the transaction. This explains the sliding scale of diligence in its mildest form in the case of a gratuitous bailee and in its severest form in the case of a borrower. This is a remarkable application of the utilitarian principle. If the bailment is for the sole benefit of the bailor, the degree of diligence required of the bailee is lowest; if for the sole benefit of the bailee, it is highest; if for the benefit of both the bailor and bailee, a middle course is adopted (This reasoning is similar to the one adopted by Roman Jurists in their classification of bailments. Cf. Post, Gaius, 478).

The Talmud limits the liability of the bailee to the following cases:

I. Negligence.

II. Damage to bailment through occurrences similar to accidents—quasi-accidents (כל גניבה קרובה לאונס Baba Meṣia 95a).

III. Inevitable accidents.

The gratuitous bailee is liable for negligence only; the bailee for reward and hire also for quasi-accidents; the borrower even for inevitable accidents (See ante Note A; B. Meṣia, Mishnah 94b.)

Negligence according to the Talmud arises in the case of a breach of duty (imposed upon a person by contract or by law) resulting in damage to another person. The standard of diligence required must be equal to the precaution imposed—by law—upon bailees דרך השומרים (Cf. Deutsches Bürgerl. Gesetzbuch, § 276, "die im Verkehr erforderliche Sorgfalt."). This standard is not absolute but changes according to person, time, place and surroundings. (Cf. Baba Mesia 42a; Zeitschrift für Vergl. Rechtswissenschaft. XXVII, 428). If the bailee does not act accordingly by either committing some positive breach of duty or by omitting the necessary care, he is guilty of negligence.

According to writers on the *Roman Law* there are three different degrees of negligence: 'ordinary,' 'gross' and 'slight.' Ordinary negligence has been defined to be the omission of that care which every man of common prudence takes of his own concerns (quam in suis). (Adopted in Deutsches Bürgerl. Gesetzbuch concerning the "Haftung des unentgeltl. Verwahrers"). Gross negligence (lata) has been defined to be the want of that care which every man of common sense, however inattentive, takes of his own property; slight negligence, the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods.

It is interesting to compare *English cases* on the question. As has been shown above Footnote (3) English Law has,

at a comparatively early period (Edw. I) freed itself of the encroaching shackles of Roman Law. Yet, though the vigorous legislation of Edward put an end to the study of Roman Law in English Universities, comparisons with Roman Law have cropped up frequently in English Law cases and led to discussions which showed that, once a chain of thought was started, it stood its ground, reappearing after temporary seclusion into the limelight of the Case Law.

The question of negligence in English Law is by some writers presumed to be totally different from the Roman divisions of 'culpa,' which are considered so vague as to be of little practical value. Baron Rolph observed that he could see no difference between negligence and "gross" negligence, that it was the same thing with the addition of a vituperative epithet; and this observation has frequently been approved in later cases (Campbell v. Train 1910). On the other hand, Lord Chelmsford (in Giblin v. McMullen, L. R. P. 2 P. C. 317) considered that although the distinctions were vague, they were useful in indicating roughly a real difference in the duty of care required in different circumstances. After all, the real test is the care that can reasonably be expected in the circumstances, having regard to what happens in the ordinary course of business and social intercourse.

A leading modern authority, however, expresses the present attitude of the English Law as follows. (John W. Salmond, Law of Torts, Sixth Edit. London 1924, p. 28), "The law does not recognize different standards of care or different degrees of negligence in different classes of cases. The sole standard is the care, that would be shown in the circumstances by a reasonably careful man and the sole form of negligence is a failure to use this amount of care. It is true, indeed, that this amount will be different in

different cases, for a reasonable man will not show the same anxious care when handling an umbrella as when handling a loaded gun. But this is a different thing from recognizing different legal standards of care. The test of negligence is the same in all cases."

So also *Austrian Law* (Entscheidung des Cassationshofes, C. H. 1701): "Welches Mass von Aufmerksamkeit, Sorgfalt and Rücksicht pflichtgemäss ist, ist objectiv zu bestimmen nach Gesetzen, Verordnungen, Verkehrssitte, unter Berücksichtigung des ultra posse nemo tenetur."

The differentiation between 'culpa levis' and 'culpa lata' is unknown to the Talmud; so, also the standard 'diligentia quam suis.'

Maimonides is very emphatic in the repudiation of this standard (Hilkot Sekirut 4, 3). . . . . "Although he (the gratuitous bailee) has deposited the bailment together with his own things he is liable for loss; with his own property he was at liberty so to act, but not with goods belonging to another . . . . . ." In other words the Talmudic Law holds the gratuitous bailee responsible for every loss which another, well acquainted with the circumstances of the case, would have prevented. To speak in the language of the Roman Law, the Talmudic Law makes the gratuitous bailee responsible also for 'culpa levis.' (Similarly the English Law, although not without some struggle, repudiated the Roman test of qualis in rebus suis. Lord Holt in Coggs v. Bernard (see ante) thought this was sufficient in the case of the gratuitous depositary, "for if he keeps the goods bailed to him as he keeps his own, though he keeps his own but negligently, yet he is not chargeable." But this view was overruled in Doormen v. Jenkins 1834, 2 A and E. 256).

The use of the phrase נטירותא יתירתא *netiruta yeterta* or, שמירה מעולה *shemirah me'ulah* in the Talmud in the

case of a bailee for reward (Baba Meṣia 93b; Hosh. Mish. 303, 11.) must not be taken to imply the adoption of two standards of diligence, viz. 1. diligence (or absence of it = negligence) of the gratuitous bailee, 2. diligence of the bailee for reward. The exact boundary line between the amount of diligence required of either can only be fixed by the judge according to the circumstances of each case.

The responsibility for theft in the case of a bailee for reward is regarded as part of his contract which he has failed to fulfil through negligence (See cases quoted Z. V. R. XXVII, p. 430.).

The bailee is regarded as liable for negligence:

A. If he transfers possession of the bailment to another bailee. (Baba Meṣia 36b. Z. V. R. XXVII p. 431. N. Hurewitch, "Die Haftung des Verwahrers" whose treatise has been of very great value in elucidating the conception of negligence in Jewish Law. In this chapter an abstract is given of his essay.)

B. If at the end of the time stipulated he cannot remember where he put the bailment (Baba Meṣia 42a).

C. If through his instructions, not clearly given, his servant or agent damages the bailment (Baba Meṣia 42b). But if instructions were clearly given, the bailee is free (See rule in English Law making principal responsible for wrongs committed by servant in course of business).

D. If he has not taken the necessary care to get the assistance of others for the safekeeping of the bailment (The gratuitous bailee is negligent if he could have secured this assistance without expense. The bailee for reward is negligent even if assistance was only procurable through money compensation which, of course, would have to be refunded by bailor).

E. If by way of jest he challenges a thief to take the bailment, although afterwards he does everything in his power to save it. (Baba Meṣia 93b).

The negligent bailee is responsible for damage not only directly resulting from his want of care but also due to accident. In the latter case, however, a certain intrinsic connection between his negligence and the accident is necessary, i. e. that without his negligence the accidental harm to the bailment could not have happened. (B. Meṣia 42a). (The bailee is obliged to use the same case as the finder of a lost article to keep the bailment in good condition e. g. if it be a wooden dish he should use it so as to prevent its rotting).

By the term '*Ones*', אונס, the Talmud designates occurrences of an irresistible nature affecting our actions or overpowering our resistance. The differentiation between accident and vis major in English Law: Cf. Odgers, Common Law, Second edit. vol. I. London 1920, p. 490ff), or '*Zufall*' and '*höherer Gewalt*' in German Law is not adopted.

The Talmud knows three kinds of *ones*:

A. אונס דשכיח *ones de shekiaḥ* an accident occurring often, e. g. where a person is prevented from crossing a river through exceptional cessation of traffic by river ferry. (Ketub 2b). This class is without legal importance even in civil cases.

B. אונס דלא שכיח *ones delo shekiaḥ* an accident occurring rarely, e. g. sudden obstruction of a river (Gittin 73). This class is of importance both in civil cases and in divorce.

C. אונס דשכיח ולא שכיח, *ones de shekiaḥ we-lo shekiaḥ* lit. "occurs and does not occur" (Cf. Ḳidd. 58b Mishna, and Rashi sub. v. מקודשת ואינה מקודשת. This class has no legal effect on validity of divorce but in civil cases frees the party concerned of liability.

The borrower, inasmuch as the bailment is to his exclusive benefit, is liable for all forms of אונס *ones* however unusual, e. g. in case of *vi et armis*, violent attack of armed robbers. But he is, of course, free if an accident occurred while he was using the bailment in accordance with his rights as bailee.

There are occurrences similar to אונס *ones* represented in the Talmud by גנבה ואבידה *genebah we-abedah* occurrences of theft and loss. (B. Meṣia 94b.) The gratuitous bailee is liable in such cases if the occurrence is due to his negligence. The bailee for reward is liable, even if he has not been careless. He is free only if he personally guarded the bailment and inspite of exercising the utmost care and using all means of preventing loss the bailment could not be saved. (Tur Ḥosh. Mish 303, 2.).

(c) By The Owner

Claim of Right

The 'Small Law Book'[93] quotes the following dictum by R. Jonah b. Abraham of Gerona;[94] 'It is also forbidden for the owner to retake clandestinely his own property (which had been stolen) without the knowledge of the one who had taken it from him. This provision was made to prevent the owner from being taken for a thief.' This passage is based on an opinion of Ben Bag Bag's in the Babylonian Talmud[95] which runs as follows: "Do not enter your neighbor's premises (*ḥaṣer*) to retake (Rashi: 'stealthily and clandestinely) your property withou this permission, but do it openly and, if necessary, forcibly."[96]

[93] Sefer Miṣwot Katon (sect. 261) by R. Isaac of Corbeil, d. 1280.

[94] d. 1263.

[95] Baba Kamma 27b.

[96] That is when by waiting, damage to the article would result; cf. Tosafot ibid. sub. שבור את שניו, and Asheri. R. Abraham Eisenstadt (d. 1868) in his Commentary to Ḥosh. Mish. *Pithe Teshubah*, Sect. 4 expresses his astonishment at Maim. and R. Jacob b. Asher because they made no mention of this passage in their codes.

This raises the problem of Self Help, so familiar to students of modern law.[97]

From the discussions in the Talmud it seems to be clear that there is unanimity as to Self Help being permitted whenever there exists the risk of irrevocable damage to the owner of the article taken. The case cited in the Talmud throws an interesting light upon irrigation problems in Babylonia:" If one wrongfully takes water from a cistern belonging to another (lit. 'If one took water out of turn from a cistern which he held in partnership with another') the one to whom the water rightfully belonged may use force to retake it." If this right were denied him, he would suffer irreparable loss; for in the arid regions of Babylonia it was impossible to obtain water elsewhere, especially in the dry season of the year.

R. Asher b. Jeḥiel[98] mentions two more cases when, by unanimous decision of the authorities, one may use Self Help:

A. When a thief is caught in the act.

B. When one finds his property in the hands of another.

The first case is generally admitted in other laws. The second one, without modification, would be open to abuses and grave offences against justice; but this possibility has been restricted by the provision that the taker in order not to make himself liable as thief and to punitive damages, would have to defend his title in a Court of Law.

In these three cases mentioned above (the one of risk of irrevocable damage; and the two mentioned by Asheri when there is no risk of irrevocable damage) it is immaterial where the self help was exercised i. e. whether it be on the

[97] Cf. Odgers, Common Law of Engl., I. Sec. Edit. p. 444. It is dealt with in detail in B. Kamma 27b and 28a; Ḥosh. Mish. 4; Maim. Hilkot Ḥobel u-Mazik 6, 5.

[98] To Baba Meṣia Chap. III, Mishnah 3. cf. Note 106.

premises of the self helper or of the one against whom the self help is used.

As to whether self help may be resorted to in case the damage threatened is not irrevocable, there is a difference of opinion between Rabbi Jehuda, who opposes it and refers the owner to take legal proceedings, and Rabbi Naḥman, who holds that a person cannot be expected to undergo unnecessary trouble; the owner's natural reaction to an attack on his property should not be thwarted. The Halakah decides against R. Naḥman.

Wherever self help is used it is necessary that the amount of force used be reasonable, and commensurate to the circumstances of the case.

If the heir of a thief uses stolen goods found in his inheritance not knowing they were stolen, he is not regarded as thief, but pays compensation for their use.[99]

If a man's apparel has been changed for somebody else's by mistake at a wedding party, he must not use it until the other person come and return his.[100]

If the wrong garment is returned by a tailor it may be used by the customer until he receive his own garment. But if he had received the wrong garment from the tailor's wife or child he may not use it.[101]

[99] Baba Kamma 112a.

[100] Baba Batra 46a.

[101] Ibid. Cf. Maim. Hilk. Sanh. II, 2, and Ḥosh. Mish. 64 concerning a bailee who on the death of the bailor retained the bailment on a counterclaim. According to the Talmud personal property devolving upon heirs was not liable for debts contracted by the deceased; but if the bailee claimed that he had seized the goods in the lifetime of the deceased his claim would be allowed if he brought evidence to substantiate this fact. According to some Geonim, the counterclaim would be allowed even if claimed after the death of the deceased. Cf. Zuri, op. cit. VI. p. 51.

(d) By Accessories

The wrongdoer, "the principal in the first degree," as he is termed in English law, may be assisted in the commission of a crime by accomplices. He may be "aided and abetted" by them, "the principals in the second degree," at the very time when the crime is committed, or he may have been instigated by them to commit the actus reus (in this case they are "accessories before the fact"), or lastly, after having committed the act, he may be sheltered or relieved by them in such a way as to enable him to elude justice (in this case they are "accessories after the fact").[102]

The Talmud furnishes an abundance of cases to justify its principle, "the associate of a thief is like a thief."[103] If one wrongdoer assists the other in committing a wrong e. g. in slaughtering an animal at the other's instructions, both are equally liable, at the option of the owner, for half the amount of *kefel* (payment of double the value of what was wrongfully taken). Both are considered thieves and are liable to be 'sold' if they cannot pay the fine.[104]

The same rule applies also if a person commits a crime with the consent of another, in which case the latter is regarded as the agent of the actual offender and the act is that of both.[104]

But in order that the accomplice be subject to the punishment of *kefel* it is necessary that he assist the actual offender in such a way that without his help the crime could not have been committed. If, however, his assistance was not essential to the commission of the wrong, his act, though amenable to whatever sanction the Court may see fit to impose, will not make him liable for *kefel*.[105]

[102] Kenny op. cit. 83 ff; Leop. Auerbach, Das Jüdische Obligationenrecht, p. 556 ff. Cf. also chap. XIV, "Receiving Stolen Property."

[103] Sanhedrin 19b.

[104] Baba Kamma, 68b. Maim. l. c. III 17.

[105] Maim. Hilk. Ḥobel u-Mazik VI, 15.

This point is brought out forcibly in a Responsum addressed by Asheri[106] to the query of his son, R. Jacob,[107] author of the Turim.[108]

Question: 'Reuben accused Simeon[109] of having entered his room, stolen his books and taken them out of the house.

S. admitted to have done so, but pleaded that a mutual relative of theirs had asked him to assist her in carrying the books out of the house, she having been unable to do so herself. He had not known whose property the books were, Reuben's or hers. Also, he said that he had not "lifted them up" but she had done so with each book and handed them to him.'

Responsum: 'R. can proceed against either of them for the value of the books. S's plea that he had not known whose property the books were is of no avail. For there is a presumption that everything a man possesses is his property and therefore the law takes it as if S. had known that the books were R's property.

Although it is admitted that the woman performed the *kinyan* (the mode of acquisition necessary to make one liable for theft if done with a mens rea—'asportation' in English Law—and hence ought alone to be responsible for the theft), yet, inasmuch as she had been unable to carry them away herself, both of them are regarded as having stolen the books.

[106] Asheri, commonly known as ROSH (R. Asher b. Jehiel, b. Germany 1250 d. Spain 1328) author of a compendium of the Talmud.

[107] R. Jacob (b. Germany 1280, d. Spain 1340) is the author of the four Turim, the four 'Rows' of laws, into which he divided his Code of rabbinic law and ritual.

[108] Ṭur Ḥosh. Mish. 348, 13.

[109] 'Reuben' and 'Simeon' in Jewish Law take the place of 'John Doe' and 'Richard Roe,' respectively, in English Law.

Therefore R. can collect either from his relative in whose possession the books are at present, or from S.'[110]

If, however, in the case cited, the woman offender should have been able to carry the books away without another's help, then the assistance rendered her by S., although it falls under the head of "assisting evil doers in their wrongful acts" [111]and therefore is forbidden, would not amount to a commission of theft and hence would not make him liable for *kefel*, because the mens rea was lacking.

If the books had come into S's possession, he would be under the obligation of returning them to the owner, as he is regarded as a finder of goods lost and, as such, is obliged to return them.

If he had not done so, it may be taken as evidence that he had assisted the woman with the intention of stealing the books and the owner has the option of proceeding against either of them.[112]

According to some authorities[113] accomplices are jointly and severally liable for the restitution of the thing stolen. Therefore if one of them escaped justice the owner can collect the whole amount from the other, analogously to the case of partners who loaned a sum of money and remain jointly and severally liable for its repayment.[114]

In the case of wrongful damage, however, each wrongdoer is liable for his proportionate part of the damage only.[115]

[110] Aruk ha-Shulḥan 348, 13.
[111] Ibid.
[112] Aruk ha-Shulḥan l. c.
[113] Ibid, 348, 14.
[114] Ḥosh. Mish. 77.
[115] Aruk ha-Shulḥan ibid.

IV

ATTEMPTS[116]

As long as the actus reus has not been consummated, the malfeasant does not become a גנב *ganab*, a thief, in respect to the article apprehended.

The reason for this is that the Jewish law does not, as a rule, recognize the inchoate crime of attempt; the mere intention to commit a wrong is not punished[117] unless it be accompanied by an act fully carrying out the *mens rea*. Therefore even the act of e. g. putting his hand (by the malfeasant) into another man's pocket and withdrawing it again without having removed an article would not amount to an actus reus sufficient to supplement his mens rea, for, although he might have been possessed of an evil intention at that particular moment, yet at the time when his actus reus was about to be realized he changed his mind (his mens rea) and withdrew; so that there was no mens rea and actus reus present at the same time.[118]

[116] "An attempt is an act done with intent to commit, or an omission with like intent, and forming part of a series which, if not interrupted, would result in actual commission. The series must have progressed so far as to justify the presumption of a criminal conclusion only" (James Stephens' Criminal Law).

[117] But cf. ante Conversion by Bailee שליחות יד *shelihut yad*, where lifting of the bailment with the intention of using it, although that intention is never consummated, amounts to "change of possession" making bailee a גנב *ganab*, one who attempted to commit conversion. From Baba Meṣia Chap. 3, Mishnah 12 it would appear that *Bet Shammai* holds that the mere declaration before witnesses to commit conversion amounts to a commission of גנבה *genebah*, taking Ex. 22, 8 על כל דבר פשע to mean "concerning every word of trespass." Cf. D. Hoffmann, Mischnaiot, Seder Nesikin p. 61 Note 72.

[118] See Tschernowitz op. cit. p. 76.

There are so many stages between the beginning of an evil intention and its realization by means of a completed actus reus that it is not possible to give an abstract test for determining whether an act is sufficiently near to the actus reus to be identified with it. Therefore the Jewish law recognizes as evidence only the fully completed actus reus by means of one of the forms of *ḳinyan*.[119]

V

OWNERSHIP

(a) The Bailee

The bailee's possession of the article entrusted to him is regarded in law to be the possession of the bailor. This legal possession gives the bailee rights against anyone except the owner. Hence, a taking from the bailee is *genebah* and either the bailor or bailee may institute proceedings against the thief.

The bailee, in case he elects to pay to the bailor the value of the article stolen instead of clearing himself (in case of a gratuitous bailee) by an oath, שבועת שומרים *shebu'at shomerim*,[120] acquires the contingent right to both the restitution and the *kefel*, etc. The taking of the oath would free the gratuitous bailee of his obligation, but would not subrogate to him the rights of the owner of restitution, etc.[121]

[119] See chap. III, B.
[120] See Note (91) ante.
[121] Mishnah Baba Meṣia 3, I.

(b) Sacred or Temple Property[122]

The protection accorded to the property of the individual has not been extended to sacred property.[123] Not only is there no legal redress in case of damage caused to sacred property through negligence (e. g. through the careless keeping of animals) but even intentional damage done to sacred property (if only lacking the element of התראה *hatra'ah*, forewarning) is free from both restitution and punishment.[124] It is only in the case of a trespass or a sin committed through error[125] (e. g. in the case of using for food animals from the temple property or[126] in the case of taking and using an article that is sacred) that there is restitution, plus an additional fifth (and a guilt offering).

These rules, marking sacred property clearly off from individual property, are deduced from the text of the

[122] Temple property consists of: 1. קדשי מזבח temple property dedicated to the altar, like animals destined for sacrifice. Such property is clothed with קדושת הגוף, inherent holiness, and could not be redeemed in money equivalents. 2. קדשי בדק הבית things which were disposed of for the benefit of the temple treasury. Such property is clothed with קדושת דמים i. e. the quid pro quo is holy, and could be redeemed.

The term הקדש, *hekdesh*, is used in post talmudic times to denote objects devoted to some religious or charitable purpose, e. g. for the poor or the synagogue. The practical use of the rules concerning הקדש disappeared with the destruction of the Temple. Hence, though a thorough understanding of the civil laws is impossible without them, they have been omitted from the Codes after Maimonides.

[123] Cf. Baba Meṣia 6b; Tosaphot, sub v. שור רעהו, where this principle is given in detail, and R. Ḥiya quoted: נזיקין להדיוט, ואין נזיקין לגבוה, i. e. the law takes cognizance of damage caused to individuals but no damage can be caused to the Deity. See also Mishnah Baba Meṣia 4, 9 and Mishnah Shebu'ot 6, 5.

[124] Whereas even unintentional damage done to property of individuals imposes the liability for full restitution. There is a similar difference with reference to other provisions of the civil law e. g. in case of overreaching, bailment, and *kefel* for theft (Baba Meṣia 56b).

The (intentional) damage to the altar and the temple building is punishable with *malkot* only (cf. Sifrè, Parashat ראה quoted by S. R. Hirsch Exodus, p. 259).

[125] Lev. 5, 15 ff.

[126] Me'ilah 18a.

biblical commands, which, by using the term רע *r'ea* (neighbor)[127] are taken to apply to dealings between man and man but not to dealings between man and the Deity.[128]

Incidentally, they took temple property out of the reach of the Courts and put it under direct protection of the Deity. They stand in striking contrast to the laws of other nations and are of interest in refuting the assertion, so often heard, that the Torah originated in the collection of priests' laws bent upon establishing a hierarchy. If this were the case, "Priests would indeed have declared a crime against temple property as the most serious of all, and in the first instance would have availed themselves of the arm of the temporal courts to protect their interests."[129]

(c) Ownerless Things

Things which do not belong to any determinate owner cannot obviously be the subjects of theft.

Ownerless things may be divided into three classes:

(i) Things which originally had an owner and were made ownerless by the voluntary disclaimer[130] on the part of the owner, הפקר *hefḳer*.[131]

[127] See Exod. 22, 8–14, and then Lev. 25, 14 where the synonym of עמית,–רע is used.

[128] Baba Meṣia 56b. According to Rashi (Sanhedrin 84a) the punishment for intentional trespass to temple property consists in מיתה בידי שמים death by divine act; according to the sages it is a simply אזהרה, i. e. lex imperfecta (without a penal sanction).

[129] Cf. S. R. Hirsch, Exodus, p. 259.

[130] Although alienation of property in general is not effective without some overt act accompanying the declaration (cf. Tur Ḥosh. Mish. 241), the Talmud (Jerush. Pĕah, Chap. 6) deduces this exception in the case of *hefḳer* declaration from the text in the Bible referring to שמיטה *shemiṭṭah*.

It is regarded like a vow which he cannot retract (Ned. II). Hence, the declaration cannot be made through an agent.—*Hefḳer* declaration in the case of slaves has the effect of liberating them from servitude and not to make them ownerless. (Shulḥan Aruk, Ḥosh. Mish. 273).

[131] Roman Law requires an overt act besides the intention (Instit. II,

Such declaration affects property whether moveable or immoveable, that is in his actual or legal possession.[132]

Anyone acquiring a *hefker* object by *meshikah* or by *hagbahah* becomes eo ipso its owner.

(ii) Things which originally had an owner, who had lost possession of them, and who had given up the hope of recovering them, יאוש, *ye'ush*.

In contradistinction to the spontaneous creation of ownerless things by the owner of an article (*hefker*) things can be made ownerless by being abandoned by their owner against his will through the force of circumstances, e. g. if stolen, or lost in such a way that, if found, the owner would be unable to give identificatory marks by means of which he would be able to regain possession. The owner would then either verbally express his despair of ever recovering the articles (express abandonment), or from his conduct or the remote chances of recovering the articles, the law would imply his abandonment of them and the renunciation of his right of ownership.[133]

In the eyes of the law such an article is considered as being equal to *hefker* (and the one who apprehends it

1. pro derelicto autem habetur quod dominus ea mente abiecerit, ut id rerum suarum esse nollet).—'Derelictio' is similar to אבדה מדעת *abedah mi-da'at*, see Gulak I, 139.

[132] But not things that are lost or stolen though he has not abandoned them i. e. despaired of ever regaining them (Keṣat Ha-hoshen, 211). Nor can one declare as *hefker* a loan that is in the possession of some one else, for the loan is a 'depositum irregulare' the debtor being obliged to restoration in kind only and therefore the money is not considered in the creditor's possession.

[133] Cf. Responsum of Sherira Gaon, quoted in Tur Ḥosh. Mish. 368, which is very instructive as to the conduct from which *ye'ush* can be implied, and the discretion of the Court in such matters. It also mentions a custom according to which Jews regarded money (articles) taken by thieves or robbers as not subject to ye'ush and therefore returned it to the owner against the restitution of the outlay incurred.

acquires ownership in it by means of 'occupatio,' or apprehension).[134]

In case *ye'ush* has taken effect, the article can be acquired by any one who apprehends it bona fide. An article lost can therefore be acquired by the finder after *ye'ush*, but not before. If the article was stolen, the thief himself cannot acquire it through *ye'ush* because he is a mala fide possessor. But a third person into whose possession the article comes after *ye'ush* may acquire it through *ye'ush* coupled with

[134] The Talmud mentions the following incidents as causing *ye'ush* to come about:

a) Loss of an article without identificatory marks.

b) Theft, which, on account of the secret way in which it is committed, is taken in Law to amount to an implied *ye'ush* (Cf. Tur Ḥosh. Mish. 368; Baba Kamma 114a. הלכתא סתם גזלה לא היה יאוש בעלים . . . אבל סתם גניבה הוא יאוש בעלים; but not so things robbed, which are not considered abandoned by their owner unless expressly said to have been abandoned.

Inasmuch as immoveables are considered by law to remain in their owner's possession, they cannot get "lost" or stolen; nor does the theory of *ye'ush* apply to them. (Cf. Maimon: Hilkot Gezelah VIII. But cf. Tosaphot Baba Batra 44a, where the opinion is expressed that although immoveables cannot be robbed, they are subject to *ye'ush* Aruk. Hash. 371).

Ye'ush presupposes the knowledge by the owners of the loss of their articles. If, for some reason, they are unaware of the loss and think the article still in their possession, a so called יאוש שלא מדעת, the *ye'ush* has no legal consequence. (Cf. ibid. XIV, 5; Baba Meṣia 21b). Articles, however whose recovery has been made impossible through some vis major interfering, e. g. if swept away by torrential rain or river, have eo ipso destroyed the right of ownership in them irrespective of whether or not the event has come to the knowledge of the owner,—objective loss of ownership. (See Baba Meṣia 22b).

Apart from the parties' conduct in trying to regain the article lost the Court may imply *ye'ush* from the locality in which the article was found, e. g. in a public thoroughfare where it would be moved about so that the owner could not hope to identify the exact place where he had lost it or if the article lost had no specific marks. (In both these cases the owner has no sufficient claim on the Court to take action. He must give reasons for summoning the alleged thief to Court and describe in detail the articles stolen. The latter requirement the Talmud deduces from the word "garment," *salmah* שלמה in Exod. 22,8 which shows that the owner claims something definite).

שנוי רשות *shinnuy reshut*, a change of possession,[135] unless the transfer be tainted by mala fides e. g. by buying it from a notorious thief.[136]

(iii) Things which never had an owner מופקר ועומד *mufḳar we-omed*, e. g. plants, trees, animals ferae naturae, and other articles found in deserts, rivers, seas, etc.[137] ('Res nullius' of the Roman Law).

Animals ferae naturae, straying at large, form the most important of all the classes of things which have no owner. Therefore fish in the sea or running stream, or wild birds and deer, etc. are not the subject of *genebah*.

The general principle of law is that all true ownership of living things depends upon actual control over them or upon the possibility of obtaining immediate control over them. Therefore, though from the prohibition to refrain[138] from catching animals ferae naturae on the field of another a certain right of its owner may be inferred, it is made clear that this control of the owner is not considered sufficient to make a trespasser liable to the charge of *genebah* if he entered an unfenced or unguarded field of another to catch the animal,[139] etc. But if the fish were in a tank of the owners or the animals or birds in an enclosed place, e. g. in a field guarded by a fence or otherwise, or if they were not enclosed but the owner stood nearby and was in a position to obtain in person immediate possession of the animal,

[135] שנוי רשות, change of possession, applies only to a change by sale or gift, not by inheritance (Ḥosh. Mish. 361).

[136] See chap. XIII, 'Market Overt.'

[137] Tur Ḥosh. Mish. 273. Maimon. Hilkot Zeḥiyah I. Comparable to statutes in many of our states including even domesticated animals. In Ohio a dog cannot be subject of larceny.

[138] Cf. Be'er Hagolah, Hos. Mish. 273, 13 לכתחילה לא יצוד שם, שאין לו רשות לכנס בתוך של חברו שלא מדעתו Cf. the so called 'property per privilegium' which the lord who has a chartered park or forest is regarded by English Law as having over certain of the wild creatures in it. It is not sufficient ownership to sustain an indictment for larceny.

[139] Cf. Hosh. Mish., 269 and 273.

etc., *genebah* would be committed by a trespasser. If neither of these requisites exists, a man's field does not constitute his possession for the purpose of acquiring title to an ownerless article.[140]

Accordingly, if one sets a trap on another's unguarded field and catches animals ferae naturae, he acquires title in them and does not commit *genebah*, though he commits a trespass.[141]

The taking of fish from nets which have been spread by another is 'equitable' *genebah*.[142]

Fish that jumped into boats or ships plying on rivers or the seas are acquired by the owner of the ship which is taken to act as *ḥaṣer*, i. e. his physical domain.[143] Although a moving *ḥaṣer* is incapable of acquiring moveables[144] a ship or boat is not regarded as moving as it has not inherent power of movement but is driven by the power of the water while lying on the surface thereof.[145]

Cress growing on a field planted with flax is regarded as *hefḳer* as long as the flax is unripe, as it damages the flax.[146]

[140] The Mishnah (Baba Meṣia 1, 4) is illustrative of what has been discussed. "When a man sees people running after a lost animal (which was in his field) e. g. after a lame stag or after unfledged pigeons, and says, 'My field shall acquire title for me,' his field vests title in him. If, however, the stag was running in its natural way or the pigeons were fledged and he says "My field shall acquire title for me' his saying is of no effect whatsoever" (Cf. H. E. Goldin, op. cit. p. 15ff).

This shows that control over animals ferae naturae may be acquired either per industriam, by their being caught (or similarly killed or tamed) or propter impotentiam, by their being unable to get away.

[141] Hosh. Mish. 269 and see a similar case in Baba Meṣia 102a.

[142] Cf. chap. V (d) Equitable Ownership.

[143] See ch. III B. ante, "Ḳinyan."

[144] Ḥosh. Mish. 202.

[145] Cf. Tosaphot Baba Meṣia 9b. comparing a boat to "a hand" that is also "moving about" but lying on the body.

[146] Cf. Baba Meṣia 107.

A field in Palestine planted with plants of two kinds כלאים *kila'im*, would under certain conditions be regarded as *hefker*.[147]

(d) Equitable Ownership by Rabbinical Enactment[148] מדבריהם

The desire to promote peaceful relations among men "מפני דרכי שלום", "*mipnē darkē shalom*," has in many cases prompted the jurists of the Talmud to refrain from applying the laws in their full rigor, and often induced them to modify the laws, in the interest of the individuals affected.

"The following provisions were made 'on account of the ways of peace;' It is 'robbery' if one takes, from a trap set by another, animals ferae naturae, e. g. birds or fish. It is also robbery if one takes away what a deaf and dumb person, a mentally defective person, or a minor (below the age of thirteen; in the case of a girl below the age of twelve) has found."[149]

Now according to strict law the trapper does not acquire ownership in the animal trapped; he must first take it into his possession by means of one of the forms of *kinyan*. And a deaf and dumb person, a mentally defective person, and a child are legally incapable of creating possession and acquiring ownership. Accordingly, the animal in the trap, the article found in the hand of the child, etc. are in fact ownerless, and according to strict law anybody would be permitted to take them. But "in order to maintain peace among men" the law has refrained from applying the principle with relentless logic and has protected the trapper,

[147] Cf. Yoreh De'ah 295.
[148] Cf. M. Eschelbacher, in H. Cohen's Festschrift, Berlin 1912 p. 501.
[149] Gittin Chap. V, Mishnah 8. Cf. Ḥosh. Mish. 370.

the child, the deaf and dumb etc. in their possessions,[150] i. e. clothed their detentio with an equitable right.[151]

In the same way, if a poor man, using his right of taking olives left for him by the owner, shakes them off the tree and has not apprehended them, i. e. has not acquired possession of them, the taking of the olives by another would nevertheless amount to robbery. Similarly to prevent heathen poor from gathering forgotten sheaves or gleaning the corners of the field would be robbery.[152]

[150] See also M. Güdeman, in the Monatsschrift für die Wiss. d. Jud. 1917, "Mosaische Rechtseinschränkung."

[151] Just as the law, in order to promote peaceful relations between human beings, recognizes mere physical facts and clothes them with a sort of equitable right, so, also, in order to express its disapproval of gain gotten by illicit means, e. g. by diceplaying or by letting birds fly for betting purposes, it calls money gotten by such means "robbery," and censures the people who do so for being engaged in an activity from which the world derives no advantage (מפני שאינו עוסק בישובו של עולם). Cf. Be'er ha-Golah ad Ḥosh. Mish. 34, 16, in the name of Rabbi Joseph Caro. If they are professional players they are disqualified as witnesses (ibid) even under oath, for there is a presumption that people who get money by such illicit means will also tender false evidence and commit perjury.

In the same category is also included the חמסן *ḥamsan*, who is one that forces another to complete a sale under duress, although he pays for it; or a collector of taxes who increases them ad libitum, etc. (Cf. Ḥosh. Mish. 34).

[152] These laws breathe a spirit of universal humanity. Cf. Maim. Hilkot Melakim X, 12, who explains the raison d'etre of these laws as follows; "Even the sick of the heathen, the sages commanded us to nurse, as well as to bury their dead like the dead of Israel, and to support their poor with the poor of Israel, *mipne darke shalom*, for it is written, 'The Lord is good to all, and His mercies are above all his creatures' and it is also written, 'Her (the Torah's) ways are pleasant ways and all her paths are peace'." Cf. Bayit Ḥadash ad Yoreh De'ah 367, where these laws are interpreted as an admonition to Israel to promote the happiness and well-being of all human beings and to participate in all efforts aiming at the advancement of the human race.

(e) Ascertainable Ownership

—Theft by Finding—

From what has been said with reference to things made ownerless by the voluntary act of the parties, '*hefker*,' or by adverse circumstances resulting in either the express or implied abandonment of articles by their owners, '*ye'ush*', it follows that where the characteristics of either are not present, the taking of an article found would impose upon the finder the duty of restoring it to its owner.[153] A breach of this duty would amount to theft by finding.

[153] The finder is obliged to announce publicly, by הכרזה *hakerazah*, that he has found a lost article, and to restore it upon proper identification by the presumable owner of the marks which the article bears or the place where it was found, or by identification through witnesses (Baba Meṣia II ff). (Cf. the interpretation, Baba Meṣia 28b of Deut, 22, 2. עד דרוש אחיך אותו to mean עד שתדרש את אחיך: until your queries establish his identity as owner.)

As to the identificatory marks, סימנין, the Talmud divides them into three classes:

I. Identificatory marks of conclusive force, סימנין מובהקין ביותר, as e. g. a hole, rent or erasure on a definitely described part of the article lost, which is not likely to occur in other articles of the same kind. The typical specimen of this class is the erasure of a certain letter in a lost manuscript נקב בצד אות פלוני.

II. Marks of medium force סימנין מובהקין אמצעין, e. g. exact length or weight or number of the articles lost or description of place where article was lost.

III. Marks of least conclusive force סימנין נרועין e. g. description of the article in general, saying that it was "big" or "small," "red" or "white."

Identificatory marks of conclusive force are prima facie effective; marks of least conclusive force are per se totally ineffective; marks of medium force are in general effective.

In case of the articles found being covers or bags or similar things, which people are in the habit of borrowing from each other, additional evidence is required, for the reason that others, besides the owner would be in a position to furnish effective evidence. (Cf. Baba Mesia 27b; Gittin 27b; Yebamot 120b; Ḥosh. Mish. 259)

In certain cases there is also an identification by means of טביעת עין (Baba Meṣia 23b), mere recognition (through the eye) i. e. the article is restored on the mere claim of the owner, without his giving identificatory marks, where the Court considers the claimant reliable.

The biblical verses with their Talmudic interpretation give a very detailed treatment of this subject, of which we can here give only the fundamental principles.

"Thou shalt not see thy brother's ox or his sheep gone astray and hide thyself from them; thou shalt surely bring them to thy brother. And if thy brother be not nigh unto thee and thou know him not, then shalt thou bring it home to thy house, and it shall be with thee until thy brother require it, and thou shalt restore it to him. And so shalt thou do with his ass; and so shalt thou do with his garment; and so shalt thou do with every lost thing of thy brother's, which he has lost, and thou hast found; thou mayest not hide thyself."[154]

The duty of restoring animals gone astray or articles lost to their owners arises only when it seems perfectly clear that they had gone astray or were lost. If, however, it seems probable that the owner had placed them where they are found or even if this be doubtful, they may not be removed. If taken, they may not be restored to the place where they had been found, if in the meantime the owner could have looked for them, but they must be restored to him by the ordinary course of proclamation.[155]

The duty of restoring the article found is fulfilled as soon as the article is returned to the physical possession of the owner, e. g. into his fenced yard or stable. This is not so in case of the restitution of a bailment, or in case of the voluntary restitution of a stolen article, in which cases the owner has to be informed of the restitution.[156]

[154] Deut. 22, 1–3. Cf. D. Hoffmann, Das Buch Deuteronomium, Zweiter Halbband, Berlin 1922, p. 13 ff.

[155] Cf. Baba Meṣia 25b כל ספק הינוח לכתחלה לא ישול ואם נשל לא יחזיר and Tosaphot ibid. Ḥosh. Mish. 216, 10. See also Baba Meṣia 30b where the finder is enjoined to regard the possible loss by the owner as his own, and take the same pains to save his property as he would in saving his own כל שבשלו מחזיר בשל חברו נמי מחזיר.

[156] Baba Kamma 118b. In case of an animal this information of the

It has not been decided whether the finder's duty with respect to the safe-keeping of the article found corresponds to the duties imposed upon the gratuitous bailee, or upon the bailee for reward; i. e. whether he is liable in case of theft or loss, or not.[157] It is settled, however, that no reward may be expected by the finder for the safekeeping and return of the article; this is an obligation imposed by law. But presumably the owner has to pay cost of keep of a strayed animal.[158]

(f) Ownership Created by the Thief[159]

—The Law of *Shinuuy*—

From the pleonastic wording of the biblical injunction, "He shall restore the robbed thing which he took by robbery,"[160] the Talmud deduces that the duty of restoring the thing robbed applies only as long as it is still in natura

owner is essential when it has been removed without his knowledge, because "it became used to another locality" (lit. it became used to steps leading outside).

[157] Cf. Baba Kamma 56b and Ḥosh. Mish. 267, 16. SHaK ad locum.

[158] The interpretation which would impose the duties of a bailee for reward upon the finder (in spite of his gratuitous services) is based on the argument that the doing of a good turn to a fellow-being in itself represents a potential gain to the doer. This idea derives from the consideration that, although the doing of miṣwot in general, should not be regarded as done for gain מצות לאו ליהנות נתנו, yet there is in fact a potential gain due to the circumstance that העוסק במצוה פטור מן המצוה i. e. when one is engaged in one *miṣwah*, one is ipso facto freed from the fulfilment of another *miṣwah* that might present itself at the same moment. (Cf. Nedarim 33b פרוטה דרבי יוסף. As to possible exemption from the duty of restoring a lost article, cf. Baba Meṣia 31b; Ḥosh. Mish. 265, 1; SHaK ad locum).

Another opinion however claims that the status of a bailee for reward is imposed upon the finder by the law, and no other justification need be considered.

[159] Cf. Ḥosh. Mish. 353.

[160] Lev. 5, 23. The words והשיב את הגזלה (without the clause אשר גזל) would sufficiently clearly express the injunction.

i. e. remains unaltered.[161] If, however, the article has undergone an essential and permanent change the law of *shinnuy* comes into force.

The wrongdoer or mala fide possessor, through such change, acquires the ownership of the article, and the money value of the article at the time of theft is taken as the basis for computing the compensation due to the owner.[162]

The article stolen may be subject to three kinds of change:

A. Change of Species ('specificatio' of the Roman Law),[163] שינוי מעשה, *shinnuy ma'aseh* when the thief makes a new object out of the materials stolen, e. g. he steals wood and makes a chair of it. This change is effective only when the new species cannot be reduced to the original species שנוי שאינו חוזר לברייתו, *shinnuy she-eno ḥozer li-beriyato.* But if the new species can be so reduced, e. g. a metal vessel that can be melted down and reduced to the rude metal then the change has no legal effect at all.[164]

B. Change of Name by the course of nature, שנוי השם *shinnuy ha-shem* e. g. if the thief stole a young lamb which becomes a ram while in his possession.[165]

[161] Cf. Baba Kamma 67a והשיב את הגזלה' מה ת'ל אשר גזלו אם כעין שגזל יחזיר, ואם לאו, דמים בעלמא בעי שלומי.

[162] The same rule applies to the payment of *kefel* or fourfold and fivefold compensation.

[163] Same in Roman Law. Cf. Dig. 41, l, 7, 7; 41, l, 26, 3. But German Law lays more stress on work involved, than on the substance. Hence 'specificatio' would make the thief an owner.

[164] Not even מדרבנן. Cf. Tur Ḥosh. ibid. Mishnah Baba Kamma 9, 1.

[165] In R. Solomon Luria's Commentary to Baba Kamma, *Yam shel Shelomoh* arguments are advanced against this by pointing to the Bible's promiscuous use of both names, irrespective of the age of the animal; e. g. in Lev. 22, 27 שור או כשב או עז כי יולד "When a steer or a sheep or a goat is (born) brought forth." Hence he proposes instead of a change in name, a change in size and age. The SHaK ad locum suggests that the average usage of these names be taken as a basis, and not the biblical language, which leads practically to the same conclusion as that arrived at by R. Solomon Luria.

C. Change of Possession שנוי רשות, *shinnuy reshut*, e. g. if the thief sells or gives the article to a third party. Change of possession as a mode of acquiring ownership in the article obtained from the thief is effective only when coupled with *ye'ush* i. e. when the article has also been "abandoned" by its owner.[166] The reason for this differentiation (requirement of *ye'ush*) in the third kind of *shinu'i*, is explained by the fact that the article, although it has been removed from its original place (from the thief's possession), has thereby not undergone any essential change. It remains the same species and retains its name.

But a change of possession[167] together with *ye'ush* on the part of the owner raises the stolen article to the standard of a lost article. The third party, obtaining the article from the thief, receives it with clean hands and thus acquires ownership of the article bona fide.[168]

According to Maimonides[169] it is immaterial whether the abandonment by the original owner takes place before the change of possession from the thief to the third party or whether the abandonment occurs afterwards. Others, and their opinion is followed by the celebrated Asheri,[170] and

[166] We have already referred to the fact that *ye'ush*, i. e. abandonment by the owner of the article lost, does not in itself act as a mode of acquisition by a mala fide possessor; but a bona fide possessor e. g. a finder, acquires ownership of article lost whenever the presence of *ye'ush* can be established. The thief must therefore restore the article in natura. This is the accepted Halakah. As to minority opinions, cf. Tur Ḥosh. Mish. 353, 4 and Tosefot to Succot 32b s. v. "Shinnuy."

[167] Or a change of name. Cf. Tur Ḥosh. Mish. 353, 4.

[168] Cf. Chaim Heller, Sefer le-Ḥikrè Halakot, Berlin 1924 §155, who discusses a statement in the *Nimukē Josef* (commentary on Alfasi's compend. by R. Joseph Habiba, Span. Talmudist 14 Cent.) that "if the ganab sold the thing stolen on a guarantee (to restore it if successfully claimed by another person) it would not be regarded as a change of possession."

[169] Hilk. Genebah V, 3, following an opinion in Baba Kamma 115a.

[170] Ḥosh. Mish. 353, 4.

ReMA[171] hold that the third party acquires the article so disposed of only when *ye'ush* has taken place before the change of possession. If therefore the thief sells the article and *ye'ush* occurs afterwards, the third party does not acquire ownership of the article.[172]

Accordingly, if the owner has been unaware of the theft, the third party cannot acquire ownership of the stolen article, even if afterwards the thief should have confessed the theft, because in point of time the change of possession preceded the abandonment.[173]

There is also a difference of operation in the third mode of *shinu'i*. In the case of either a change by specification or a change in name, the thief acquires the article itself, but incurs the concomitant obligation of returning to the owner the value thereof. The mere acquisition of ownership of the article does not free the thief of his obligation. However, in the case of the acquisition of the article by the third party through a change of possession, the third party bears no obligation whatsoever, the thief having to compensate the owner.

Maimonides qualifies the last mentioned law.[174] According to him, the third party's freedom from any obligation is dependent on his bona fides. If he obtain the article in the ordinary way of business from a tradesman whom he has no reason to suspect—though in fact the latter stole the article—the law of "Market Overt" תקנת השוק *takḳanat ha-shuḳ*, applies and he is free from restitution or compensation. If, however, the third party obtains the article from a notorious thief, the mala fides taints the change of possession and the change is effective only as far as the article itself is

[171] Cf. Kiṣur Piskè ha-Rosh Baba Kamma X, 18.

[172] A parallel reasoning we discover in the case of finding a lost article, which, if found before *ye'ush*, cannot be acquired by the finder, and must be returned.

[173] Cf. SHaK ad Ḥosh. Mish. 353.

[174] Maim. Hilk. Genebah, 5, 3.

concerned; but the owner is entitled to compensation from the third party.[175]

This view is opposed by others as contradicting the accepted result of the Talmudic discussion in Baba Kamma 115a.[176]

The term, "change of possession," is limited to a transfer of property brought about by selling it or donating it to a third party. It does not comprise the devolution of property upon death. Hence, if a thief dies, no "change of possession" takes place, and his heirs, even after *ye'ush* has occurred, are obliged to restore the stolen property to the owner.[177]

[175] Cf. SHaK ad locum (353,6) who avers that all authorities hold with Maim. that the buying from a notorious thief cannot be regarded in law as a change of possession, as it is weakened by *mala fides*. Therefore the buyer has to restore the value of the article. This view, however, is opposed by others who hold that change of possession and *ye'ush* are effective in any case, even if the third party bought it from a notorious thief.

[176] The author of the Aruk ha-Shulḥan, Rabbi J. M. Epstein, offers a solution of the difficulty by suggesting that Maimonides' opinion is not a statement of law but a dictum, the result of the following reasoning:

In the case of a buyer from an unsuspected thief, before the *ye'ush* of the owners has taken place, the Talmud provides for the restoration of the article bought to its owner on his returning the price paid to the thief by the buyer. This is part of the doctrine of Market Overt. In the same way Maimonides argues, if one buys an article after *ye'ush* from a notorious thief the law should provide for the return of its value to the owners, this time protecting the owners against the mala fides of the buyer.

But inasmuch as the above dictum of Maimonides is not supported by a similar opinion in the Talmud his opponents do not accept it.

The author of the commentary Maggid Mishnah ad locum (Hilk. Geneb. 5, 5.) points out that, the text of Maimonides being corrupt, it might be difficult to reconstruct the original version. It seems, however, clear that the opponents of Maimonides were using a version which omitted the reference to Market Overt as reason for the weakened effect of the change of possession.

R. Joshua Falk (in SeMA ad 353, 7,) points out that according to Maimonides, if the buyer from an unsuspected thief after Yĕush bought the article for a price below its market value, he has to recoup the owners with the difference.

[177] Cf. Baba Kamma 111b רשות יורש לאו כרשות לוקח דמי, and Tur Ḥosh. Mish. 353, 7, 8; Chaim Heller op. cit. Chapter 157.

VI

DINA DE MALKUTA DINA

Conflict of Laws arising out of the differences of principles obtaining in the Jewish and other laws.[178]

The problem of what line of conduct to adopt in the case of the clash of principles between the Jewish law and the law of the country, presented itself with special force in the time of the famous Mar Samuel, the head of the Academy in Nehardea (165–254 C.E.). The emigration from Palestine and the growth of the Jewish Community in Babylonia had shifted the center of gravity towards the East. Judaism claimed that the destruction of the Jewish State in no way affected the fealty of the people to the Jewish law. On the other hand, the State in which the Jews lived as new citizens was justified in claiming their allegiance to its laws. This problem of a double allegiance had to be solved, when the Sassanides became the rulers of Babylonia. Their King, Ardeshir (226–241 C.E.), ordained that henceforth the jurisdiction of the Jewish Courts should be subordinate to the Courts of the State.

Mar Samuel, convinced that it was the paramount duty of every citizen to pay due respect to the laws of the State, was anxious to ensure for this principle (already referred to in an old Mishnah) full recognition by the people at large. He, therefore, propounded the law that *dina de-malkuta dina*, the 'law of the state is full law.'[179] This maxim, recognized by all later authorities as binding, enjoined the fulfillment of the laws of the state as a religious duty. In consequence of this idea, Samuel assumed the responsibility

[178] Cf. D. Hoffmann, Der Schulchan Aruch, Berlin 1894, p. 72 ff.
Cf. D. Hoffmann, Mar Samuel, Leipzig 1873.
Cf. S. Funk, Die Juden in Babylonien, Berlin 1902, p. 56.

[179] Baba Kamma 113b.

of modifying several Jewish laws, so as to comply with the laws of Persia, (although full civil jurisdiction had been granted to the Jews) especially where this appeared as natural corollary of his policy.[180] As a result, it could be said that "Jews and Persians, at least during Samuel's lifetime, lived in peace and friendly intercourse."

However, this principle, had it been consistently applied, would have done away with the whole body of the Jewish law and substituted for it the law of the land. As a matter of fact, R. Joseph Caro mentions localities where the Jews had supplanted their own law by the non-Jewish law of the State.[181] In most cases (as up to recent times in Turkey) the Jewish Rabbis were left in full control of civil jurisdiction, which they settled according to Talmudic-Rabbinic principles.[182]

The maxim, therefore, was restricted in its scope so as to apply to laws and rules affecting the "benefit of the King or the welfare of the inhabitants of the country."[183] However, even this limitation was not considered clear enough and there is a difference of opinion among later authorities as to the cases in which a Rabbi must consider himself bound by the law of the land.[184]

But so much is settled: Every act harmful to the State, as smuggling, evasion of taxation,[185] or the wrongful infringe-

[180] Baba Meṣia 108a, Baba Batıa, 55a, e. g. Statute of Limitations after 40 years. Cf. Dr. Ph. Biberfeld in Vol. II of Schriftenreihe des Bundes Jüdischer Akademiker, p. 10 ff. The principle was first applied to the payment to the King of a headtax כרגא and a real estate tax טסקא. Fields for which the owners had paid no tax became legally ownerless and could be occupied by another on paying the tax.

[181] Hosh. Mish. 348; 369, 11, דיני ערכאות.

[182] D. Hoffmann, Der Schulchan Aruch, p. 73.

[183] Ḥosh. Mish. 369, 8; 356, 7.

[184] Cf. SHaK ad Ḥosh. Mish. 74, near end of section; ad Yoreh Dĕah, 165.

[185] Cf. Hebrew periodical Yedidya, 1820, Vol. V. p. 263 concerning the rabbinical decree of *ḥerem* (excommunication) against buying and

ment of property rights, etc. is a grave religious crime.[186] The law of the land superseded the Jewish law as to all political and civil rights. Even when special legislation compelled the Jews to pay more taxes than the other citizens, the Shulḥan Aruk, adopting the opinion of Rabbi Joseph Kolon,[187] expressed in one of his numerous responsa, prohibits the evasion of it.[188]

The law of theft furnishes another example of the subservience of the Jewish law to the law of the State. It is laid down[189] that, "a buyer from a thief should restore the

selling merchandise when one is not sure if the governmental custom dues have been paid.

[186] Ḥosh. Mish. 369, 6.

[187] MaHaRIK, about 1480.

[188] But the Jews of Spain did not consider unjust demands of the King unqualifiedly binding. R. Solomon b. Adret (Spanish Rabbi 1240–1310) in his Responsa boldly modified the general principle—דינא דמלכותא דינא, גזלנותא דמלכותא לאו דינא "We recognize the fair demands of the King as law, but robbery is not a rightful prerogative of royalty." Many cases of arbitrary, unlawful confiscations appear in the responsa where this distinction had to be drawn by the Rabbis to protect the victims of royal greed. Cf. Abraham A. Neuman in Vol. XXII of the Am. Jew. Hist. Soc., pp. 65–67.

But whereas royal decrees were in general considered binding, no such provision applied to the common law of the land in which Jews lived דינא דמלכותא דינא, דינא דאומתא לאו דינא לנו "We recognize the King's law but the legislations of the nation or the interpretations of the general courts do not constitute law for us"—"on whatever agreement the Jews lived in the land, the parties to the implied contract were the Jews on the one hand, and the King on the other." The nation was a third party and was not included in the transaction. Ibid. p. 67.

Cf. Bet Joseph ad Tur Ḥosh. Mish. 2, quoting a responsum of Solomon b. Adret, and Ph. Biberfeld l. c. p. 33–34, who refers to the glosses of Naḥmanides (b. Gerona, Spain 1194; d. in Palestine 1270) on Baba Batra, Perek III, in which the application of the principle of *dina de-malkuta dina* is limited to laws issued by a constitutional king in a constitutional way.

Cf. also Chaim Heller, op. cit. chap. 178, re הפקעת הלואה which does not apply if the government is involved.

[189] In the commentary 'Mappah,' by R. Moses Isserles, ad Ḥosh. Mish. 356, 7.

article stolen, even after *ye'ush* had taken place," in other words, the good title which the buyer had acquired according to Jewish law, is rendered nugatory by the opposing view of the law of the land.[190]

VII

THE LAW OF AMELIORATION

All objects, in the ordinary course of existence, are subject to change; they increase or decrease in quantity or in value. The increase in the value of an article within a certain (fixed) time is called שבח *shebaḥ*. We distinguish three kinds of *shebaḥ* in Jewish law:

A. An increase in value brought about by an outlay of money for that purpose שבח הבא מחמת הוצאה, *shebaḥ ha-bo maḥmat hoṣa'ah*.

B. An increase in value brought about of itself i.e. because of the natural growth of the object שבח הבא מאליו, *shebaḥ ha-bo me-elaw*.

C. An increase in value due to the rise of the market price of the object without any change in the object itself שבח הבא מחמת יוקר השער, *shebaḥ ha-bo maḥmat yoker ha-sha'ar*.

The term *shebaḥ* comprises all changes occuring in the principal thing and raising its market value. Therefore fruits still connected with the soil, the wool on the back of animals, the foetus still within the animal's body are considered *shebaḥ* and not fructus.[191]

The *shebaḥ* of an object to, whatever cause it may be due stands in intimate connection with the principal and cannot

[190] Cf. Biberfeld l. c. p. 27 for the application of the principle to stranded goods.

[191] Cf. Gulak, ha-Mishpat ha-Ibri, Berlin 1923, I, p. 100. Maim. Hilk. Malweh we-Loweh XXI, l, 2; Baba Meṣia 14; Ḥosh. Mish. 354,

in law be separated from it. The acquisition of the principal things always includes the acquisition of the *shebaḥ*, but the acquisition of the *shebaḥ* does not affect the principal and results in a mere claim against the owner of the principal for the value of the *shebaḥ*.[192]

Under the law of *shinnuy* were discussed the changes in the essence of the object stolen which were regarded as sufficient changes in the entity of the object to act as a mode of acquisition by the thief. Here we propose dealing with changes in the value of the article stolen in some cases equivalent to *shinu'i* to act as a mode of acquisition and to affect the question of compensation to the owners.[193]

According to the opinions of R. Asher b. Jeḥiel and R. Jacob b. Asher, both שבח הבא מאיליו *shebaḥ ha-bo me-elaw* amelioration due to natural causes,[194] and שבח הבא ע"י הוצאה *shebaḥ ha-bo al yede hoṣa'ah*, amelioration due to money outlay, are considered *shinu'i* with regard to the principal thing and the amelioration itself.[195]

[192] Ḥosh. Mish. *ibid.*

[193] Cf. Baba Kamma 93 ff; Ṭur and Sh. Aruk Ḥosh. Mish. 354.

[194] Cf. the delivery of young by an animal; the wool grown on a sheep's back.

[195] "It is settled that not only in case of a stolen cow which became gravid while in the possession of the thief and brought forth young, or a sheep the wool of which grew while in his possession and was shorn, that the wool and the young are the thief's property, (as are the cow and the sheep by virtue of *shinnuy*); but even when he stole a gravid cow and she brought forth while in his possession, or he stole a sheep with its wool grown and he sheared it, both the principal and the amelioration belong to him and, on conviction, he has to pay according to the value of the cow and the sheep at the time they were stolen. For the thief has acquired property in them by the changes due to delivery or shearing which are considered essential changes." (Ṭur, ibid).

This law obtains even where the owners made claim while the wool was still on the sheep's back, or while the animal was still gravid. As a general rule the value of the article at the time of the taking is made the basis for the compensation irrespective of the time the claim of the owners was made. Cf. RoSH ad Baba Kamma Chap. 9, Mishnah 3.

Maimonides, however, maintains that the rule differs according to whther the *shebaḥ* came about naturally or was the result of the thief's[196] effort or outlay of money.[197]

"If the article stolen ameliorated of itself[198] while in the possession of the thief, the thief, on conviction must 'pay for' the principal and the amelioration,[199] supposing that the latter occurred before *ye'ush* had taken place; if after *ye'ush*, the thief pays according to the value of the principal thing at the time of the theft. If on the other hand the amelioration was due to the thief's outlay of money, the increase in value belongs to the thief even before *ye'ush*; and when on conviction he restores the article stolen with

This is deduced from the pleonastic wording of the command והשיב את הגזלה אשר גזל, ante). If the animal was gravid when stolen but did not deliver while in the thief's possession, although the embryo had grown in size, this is not regarded as *shinnuy*. (Cf. BaḤ ad T. Ḥosh. Mish. 354, 1.) and therefore, if the cow is claimed by the owner, the thief must return the animal in natura as it is regarded as having remained in the owner's possession. *Shinnuy* is limited to the cases in which the animal not gravid became gravid or originally gravid afterwards delivered and the same rule applies to the case of the sheep with its wool.

The view that the bringing forth of young by an animal or the shearing of its wool bring about an essential change in respect to acquiring the animal itself is rejected by R. Joseph Ḥabiba (in the Nemukĕ Josef ad Baba Kamma 93), who admits, however, the change in respect to the young and to the wool shorn. (Cf. also Tossafot, Baba Kamma 95a, sub v. שבח).

[196] With reference to robbery see Maim. Hilk. Gezelah, II, 1, 2. The Law of Amelioration is the same in case of both theft and robbery (cf. Maggid Mishneh Hilk. Geneb. 11).

[197] Cf. Hilk. Geneb. I, 11.

[198] As examples of such amelioration Maim. mentions the delivery of young and the shearing of wool from a sheep.

[199] R. Zechariah Mendel b. Aryeh Loeb (Polish Rabbi 18 Cent.) in his Commentary Be'er Heteb ad Ḥosh. Mish. 354, 1, remarks that since according to Maim. there is no reason why the amelioration spoken of in the text should act as mode of acquisition, the "paying for" the principal and the amelioration must be understood to mean the restoration in natura of the principal and the amelioration, which legally had remained in the possession of the owner.

the *kefel*, he has to be recouped by the owners for the *shebah*, or its value has to be deducted from the *kefel*."

This seems to be in direct contradiction to the Talmudic law, according to which[200] both לידה *ledah*, the birth of animals, and גיזה *gizah*, the shearing of wool, are regarded as *shinnuy*. But on examination[201] it is found that the authorities of the Talmud itself are by no means unanimous on the point.

The dictum that both *ledah* and *gizah* are regarded as essential changes, and act as modes of acquisition, represents the minority opinion of Rabbi Me'ir whose view does not prevail. According to the accepted opinion of both Rabbi Judah and Rabbi Sime'on, such changes are not regarded as essential,[202] but only as simple amelioration similar to an animal's gain in weight.

The latter's opinion is also accepted by Maimonides who, however, holds that the thief acquires property in the amelioration after *ye'ush* due to the "Ordinance for the sake of Penitents" תקנת השבים,[203] *takḳanat ha-shabim* (The

[200] Baba Kamma 95.

[201] Cf. HaGRO (Glosses by R. Elijah of Wilna, 18 Cent.), ibid, Rom's Talmud Edition; M. Bloch, Die Institutionen des Judent. Wien II, 2, 319.

[202] Cf. SeMA, ad Ḥosh. Mish. 354, 1, who explains that Maim. regards לידה וגיזה as שנוי החוור לברייתו i. e. as non permanent change. (Cf. also SHaK ibid).

[203] The jus strictum has been modified to facilitate the active repentance of those who, having committed a wrong, are desirous of atoning for it. The following are the leading cases of the application of the ordinance:

A. In case of *specificatio* i. e. making of a new article by the thief out of the material stolen (see ante ch. V (f)), the ordinance provides that repayment should be made by the thief according to the value of the article at the time of the theft (Baba Kamma 94b), although according to strict law the thing stolen ought to be returned in any case (see Chapter XVI. "Restitution"). In connection with this rule the following case is cited. "It happened that a certain man intended to profess publicly repentance for his robberies and proposed to restore all goods belonging to other people. But his wife told him, 'Thou art a

ordinance, however, comes into effect only after *ye'ush*; it is only then that the law is anxious to facilitate the active repentance of the wrongdoer; and in order that the wrong-

fool if thou thus repent; all thou possessest will be taken from thee even to the girdle thou wearest, and thou wilt be destitute' and he was kept back from repenting." In consequence of this incident it was decided that if a robber or usurer comes forward to confess his guilt and to restore what he had illegally taken we should receive him as a penitent, but not take back from him the things he has unlawfully acquired, because such a course would deter others from repenting. The Talmud, however, decides that this law refers to the payment of money only; but if the things robbed are still in the offender's possession, he must restore them.

B. Wherever the amelioration of a stolen article has been brought about by the thief's own efforts the ordinance provides (Baba Kamma 93 ff) that in order to induce him to return it, he is by law entitled to claim recoupment for it from the owner (see Maim. ante. p. 55).

C. If a robber used a stolen beam for the building of a house, Bet Shammai holds the beam must be restored in natura to the owner, even if the whole house has to be torn down (fiat justitia pereat "domus"). Bet Hillel holds that the owner is entitled only to the value of the beam on account of the "Ordinance for the sake of the Penitents." (Giṭṭin Perek 5, Mishnah 5 and 55a; Baba Kamma 95a).

ת"ר גזל מריש ובנאו בבירה, ב"ש אומרים מקעקע כל הבירה כולה ומחזיר מריש לבעליו, וב"ה אומרים אין לו אלא דמי מריש בלבד, משום תקנת השבים.

The view of Bet Shammai represents the *jus strictum*. The jurists of the Talmud, following Bet Hillel, refused to accept it and adopted on ethical and practical grounds the rule restricting the owner's right of property. Instead of the thing stolen the owner receives its value. The reason given is that the full severity of the law would deter wrongdoers from repentance. (See Ta'anit 16a for an opinion that the people of Nineveh, Jonah, chap. 3, 8, attempted to live up to Bet Shammai's view).

The Roman Law (L. 1 pr. para. 1 D. de, tigno juncto 47, 3) has the same provision as Bet Hillel but gives another reason for it. "Ulpianus (libro XXXVII ad Edictum) Lex XII tabularum neque solvere permittit tignum furtivum aedibus vel vineis iunctum neque vindicare; quod providenter lex effecit, ne vel aedificia sub hoc pretextu diruantur vel vinearum cultura turbetur; sed in eum qui convictus est iunxisse in duplum det actionem." "The laws of XII tables permit neither the taking out of a beam that was stolen and used in building a house or a vineyard nor its claim by means of vindicatio (Action for Property). This the law providently enacted in order that buildings should not be torn down under the pretence of recovering the stolen timber, nor the culture of vineyards be destroyed; but against the one convicted of the "joining" the law grants an action for double the amount."

doer may be induced to restore the thing taken, the ordinance provides that he shall acquire the value of the amelioration).

Maimonides holds that in the case of *shebaḥ*, due to outlay by the thief, he can always claim recoupment; and that when the thing taken was essentially changed, the thief acquires property in both the principal and the amelioration and, on conviction, has to repay only the value of the article at the time of the theft.

R. Moses Isserles[204] maintains that there are some authorities who say that not only in the case of *ledah* and *gizah* (which, agreeing with the *Ṭurim*, he regards as essential changes, though inexactly he simply calls them *shebaḥ* and not *shinnuy*) both principal and amelioration belong to the thief, but also in case of the animal which had not been gravid when stolen but became gravid while in the thief's possession (without delivering).[205]

VIII

MOVEABLES AND IMMOVEABLES

The wrong of *genebah* is completed as soon as the article taken leaves the רשות,[206] *reshut* the possession, of the owner and is transferred into the possession of the *ganab*, the thief. Hence *genebah* is only possible in case of moveables but not

[204] Ḥosh. Mish. 354, 1. The text of the ReMA quoted is interpreted according to the gloss of Be'er Heteb and the comments of SeMA and SHaK ibid. Much difficulty arises by his promiscuous use of the term Shebaḥ" for both amelioration equivalent to Shinui, and for amelioration proper. See ante, e. g. where גיזה ולידה and the conflicting opinions of Ṭur and ROSH and ReMA on the one hand, and Maim. on the other, are discussed. Cf. Aruk ha-Shulḥan 354, 8.

[205] Cf. BaḤ 354, 1 end.

[206] Cf. שיטה מקובצת ad B. Kamma 79, where RaBED is quoted as deducing from text in Exod. XXII, 3, המצא תמצא בידו הגנבה, that articles taken must have left the רשות of the owner.

in the case of immoveables[207] (houses, landed estate etc.) which are considered to remain in the owner's legal possession wherever they are: דכל היכא דאיתא ברשות מרא איתא.

Slaves are treated as immoveable property. They, like immoveables, were bought either by paying the agreed price, or by a "Bill of Sale," or by taking of possession.[208] According to a Boraita they might be bought by means of barter.[209] The reason for treating the slave legally as immoveable—in most cases the Talmud mentions him in connection with landed estate[210]—arose from the desire to prevent the slave being degraded to the standard of cattle: consequently he was not incorporated into the law of moveables, which latter the owner was at liberty to destroy or kill at will, a right never conceded in the Talmudic law to the owner of a slave. The slave therefore fits more into the class of immoveables, which in most cases are indestructible (res infungibiles) and yield produce (fructus).[211] [212]

[207] In fact the "taking away" of immoveable property is only possible by committing the wrong of "Removing the Landmark" הסגת גבול which is classified as a special wrong; and further it comes under the head of robbery, גזלה. The reason for the exclusion of immoveables and slaves, is due to the fact that the types given in the original prohibition of גנבה (Ex. 22, 8) represent moveable property only; hence it was not open to the Jurists of the Talmud to extend it to immoveables and slaves, which were treated like immoveables.

[208] Ḳidd. Perek 1, Mishnah 3 נכסים שיש להן אחריות נקנין בכסף בשטר ובחזקה.

[209] Ibid. 22b. עבד כנעני נקנה בכסף בשטר ובחזקה. Cf. M. Hyamson, op. cit. p. 159.

[210] Ibid.

[211] See S. Rubin, Ein Kapitel aus der Sklaverei im Talmudischen und Römischen Rechte, in Festschrift, Adolph Schwartz, Berlin und Wien, 1917, p. 211 ff, and M. Mielziner, Slavery among Hebrews, 1894.

The Talmud (Megillah 23b) explains the legal position of the slave by stating (see Lev. 25, 46) that he was not subject to any kind of acquisition but devolved like an inheritance from father to son.

[212] The "taking of possession" of the slave consists in the slave doing certain menial service for his new master e. g. dressing, washing, annointing him. According to Samuel (Kiddushin Chap. 1, Mishnah 3.) the slave could also be acquired by משיכה *meshikah*, by the new master drawing the slave towards himself. In Jer. Baba Kamma p. 87, Hal. 1 it is said: the bodies of slaves could not be stolen, only the use of their work עבדים שאין בהם אלא תשמיש.

IX

VALUE AND 'LUCRI FACIENDI GRATIA,' THE INTENTION OF THE THIEF TO ENRICH HIMSELF

We have seen, that in order to constitute theft, the article stolen must possess some value.

Promissory notes—documents of indebtedness—could not be stolen. The reason for this is that such documents are only evidence of a right, and in themselves have no commercial value.[213]

The negotiable instrument, the origin of which Sombart[214] ascribes to Jewish business acumen, was unknown in Talmudic times. The שטר[215] *sheṭar*, was an acknowledgment by one definite person, whose signature it bore, of a loan; this document was handed over to the creditor, another definite person, by *ḳinyan*, a certain form of transfer. Therefore, when this document was stolen, the taking amounted only to a גרם הזק *geram hezeḳ*[216] a causing of damage, not to theft, for the document in itself represented no value. The thief could not exact payment of the debt from the debtor without being able to prove that he had originally received the document from the debtor, which he plainly could not do, and therefore the thief could derive no benefit from the taking of the document, but only caused damage to another person; he is regarded as a מזיק, *maziḳ* one who has caused damage only

[213] Cf. Gulak, op. cit. vol. II 221, note 17.

[214] In his "Die Juden und der Kapitalismus." Cf. M. Hoffman, Judentum and Kapitalismus, Berlin 1912, p. 11, re Sombart's opinion on the origin of Negotiable Instruments; Tschernowitz loc. cit. p. 81; Nathan Isaacs in The Legacy of Israel, Oxford 1927 p. 397.

[215] Cf. J. Levy, Neuheb. u. Chald Wörterbuch p. 544 sub שטר. Auerbach L. op. cit. p. 263. L. Fischer, "Die Urkunden im Talmud," in Jahrbuch der Jüd. Lit. Ges. 1912 p. 45 ff.

[216] Gulak op. cit. II, 207.

and not as a *ganab*. He has to return the article taken and is liable for negligence, פשיעה *peshi'ah* but not for accident, אונס, *ones*.

According to the definition of theft by Paulus, the thief's intention to enrich himself by means of the article stolen is an essential element in the crime of furtum. This element has been received into the legal systems of those European countries which, since the establishment of Roman Law Schools, have for Centuries remained under the influence of the Roman Law. It is e. g. now a conditio sine qua non in the Criminal Laws of Austria and Germany.[217]

It played an important role in the case of the famous German Socialist, Ferdinand Lassalle, one of whose friends was on trial for having, at Lassalle's instigation, stolen certain documents by entering the apartments of a rival of Lassalle's client. As it was shown that Lassalle had been acting as defending counsel without pay, and that his friend had taken the documents to prove the client's title to her property and to save her from starvation, the element of lucri causa was proved to have been absent, and an acquittal followed.[218]

In the law of the Talmud the reason for stealing seems to be immaterial, and therefore the presence or absence of the element of intended gain does not change the character of the *actus reus*. The Talmudic Law goes even so far as to say that even where the intention of the thief had been

[217] See Introduction note (1). The Austrian Strafgesetzbuch Sect. 174 defines Diebstahl as "widerrechtliche gewinnsüchtige Entziehung einer fremden, beweglichen, nicht völlig wertlosen Sache aus dem Gewahrsam eines andern." Similarly the German Strafgesetzbuch.

Both the German and the Austrian Law have under the influence of Roman and Cannon Law developed out of the German Common Law. Cf. Lehrbuch des Deutschen Strafrechtes by Hugo Meyer, 6. Aufl. Einleitung.

[218] A. Kohut, Ferdinand Lassalle, sein Leben und Wirken, Leipzig 1869, p. 25.

to enrich the owner of the article taken by paying him double compensation, or where, on the other hand, he only intended to derive the personal satisfaction of aggravating the owner by taking the article for a time, his actus reus was sufficient.[219]

X.

NON-TECHNICAL THEFT

Thefts which Offend Laws of the Torah But are not Punishable

The biblical command,[220] "Ye shall not steal," prohibits the theft of any object, however small in value, belonging to another person.[221]

A Court of law, however, would not take cognizance of the theft of an article the commercial value of which was less than the smallest recognized legal tender i. e. less than the value of a Perutah פחות משוה פרוטה *pahut mi-shaweh perutah* (a small coin, one-eighth of the "as"), for it is assumed that in this case people abandon their property, as "Less than a Perutah is no money."[222]

[219] But according to the Keṣot Haḥoshen ad Ḥosh. Mish. 348, 1. in both cases, though the takers are not liable for accidental loss of the article, they are liable for its loss or theft, which shows a disinclination of the law to regard them as thieves; for thieves are liable for loss by accident.

[220] Lev. 19, 11.

[221] The prohibition, "Thou shalt not steal" (Ex. 20, 13) is interpreted to refer to the kidnapping of human beings. This method of interpretation called technically דבר הלמד מעניגו, deduces from the context in which this commandment is found (it stands in the decalogue together with such capital crimes as "Thou shalt not murder, Thou shalt not commit adultery") that "Thou shalt not steal" also refers to the capital crime of stealing human beings. The commandment in Leviticus 19, 11, however, is taken to prohibit the stealing of money, etc. as can be deduced from the context there, it being followed by "Ye shall not act deceitfully nor lie to one another."

[222] Sanhedrin 57a. Maim. Hilkot Genebah 1, 2; SeMAG (abbr. for Sepher Miṣwot Gadol, by R. Mose of Coucy, France, 13 Cent.) Prohibitions 155. Tur, Ḥosh. Mish. 348, 1.

But the taking of an article of the recognized minimum value of a Perutah amounts to a transgression of the biblical command, imposing on the taker the obligation of returning it to the owner, obligatio ex delicto,[223] and involving the imposition of punitive compensation.

Similarly, in the following cases the value of the Perutah was made the conditio sina qua non for the court to grant redress:

A. In the case of overreaching אונאה, *ona'ah.*

B. In the case of robbery גזלה, *gezelah.*

C. In the case of the unlawful use of sacred property, מעילה בהקדש[224] *me'ilah be-hekdesh.*

If the value of the article was less than a Perutah, the prohibition would be "lex imperfecta" as the sanction imposed would be extra-judicial and moral only.[225] These thefts are forbidden irrespectively of the religion of the owner[226] or whether they affect private property or charita-

[223] There are only two kinds of sanctions in the Jewish Criminal Code: death for capital crimes and מלקות *malkot* (a maximum of thirty nine stripes; the number of stripes to be applied to the delinquent was determined after a medical examination; the executioners were recommended to be men full of understanding of human nature, and not prominent in strength חסירי כח ויתירי מדע cf. Makkot 22b ff.). The punishment of *malkot,* however, was excluded in case of prohibitions which could be annulled by fulfilling the positive command joined to it by the Torah לאו הניתק לעשה. Therefore in the case of theft, which is of the latter kind *malkot* does not apply. זה הכלל כל מצות לא תעשה שיש בה קום עשה אין חייבים עליה Makkot Perek 3 Mishnah 4; Maim. Hilk. Gen. l, 1.

[224] Cf. Baba Meṣia 55a.

[225] Cf. Sanhedrin 57a; Maim. Hilk. Gen. l, 2. SeMAG Prohibitions 155. Ḥosh. Mish. 358, 1. An analogy to this case exists in the prohibition of eating forbidden food. The sanction of *malkot* will not be imposed unless the offender eat a legally fixed measure שעור *she'ur* though even by eating less than that, כל שהוא *kol-she-hu* he would transgress the biblical command. (Cf. Yoreh Dĕah Hilk. Yom Kippur; Baba Meṣia 61b). This applies also to the prohibition of carrying on Sabbath (Mishneh le-Melek to Maim. Hilk. Shab. 18).

[226] Baba Kamma 113a; Sanhedrin 85a.

ble institutions, or whether the owner is regarded as a legal person i. e. of full age and in possession of an unimpaired animus acquirendi, or not, e.g. a minor.[227]

The sanctity of property laws and the absolute prohibition against interference of any kind with them has been responsible for declaring as non-technical theft the taking of another's goods, where the intention was to retain them just for temporary use and to restore them to the owner in the same condition;[228] or where the intention was only to aggrieve the owner for a time[229] על מנת למיקט *al menat le-meḳeṭ* and then to restore them; or where the goods were taken by way of a joke[230] and were returned afterwards; and it is also declared non-technical theft where *mens rea* was entirely absent i. e. where instead of the mens rea there was a mens benigna[231] e. g. the good intention of stealing another man's goods in order to benefit him by the payment of the double compensation.[232]

[227] Sanhedrin ibid.

[228] SeMA (Sefer Me'irat Enayim, a commentary on Shul. Aruk, Ḥosh. Mishpat by R. Joshua Falk d. 1614 Lemberg) to Ḥosh. Mish. 348, 1.

[229] Cf. Shittah Mekubeṣet ad Baba Meṣia 61b; There are some who explain "to aggrieve him" to mean that the thief's intention is not to detain it (permanently), but only (temporarily) to aggravate the owner. But that is not feasible . . . . . we hold with the others who interpret that ע"מ למיקט is prohibited only when the thief's intention is to detain the article permanently i. e. his sole reason in taking and retaining it being not to make use of it but to cause the owner grief. Maim. however, in Sefer ha-Miṣvot 244 seems to follow the stricter view. Cf. Keṣot ha-Ḥoshen ibid.

[230] Ḥosh. Mish. 348, 1; Maim. Hilk. Gen. 1, 2.

[231] Sifra, Ḳedoshim 23, 2; לא תגנובו ע"מ למיקט, לא תגנבו ע"מ לשלם תשלומי כפל ותשלומי ד' וה', i. e. the taking is forbidden even where the takers, intention was to aggravate the owner or to benefit him. There is a difference of opinion among the later authorities as to whether these are non-technical thefts or whether they are technical thefts making the takers amenable to punitive compensation. See Keṣot ha-Ḥoshen on Ḥosh. Mish. 348, 1.

[232] Baba Meṣia 61b. Rashi ibid. sub ע"מ לשלם תשלומי כפל explains שרוצה להנותו ויודע שלא יקבל i. e. the offender desires to benefit the

A thief proper is liable for the restitution of the article even when it was lost by a circumstance beyond his control, אונס *ones*, whereas a non-technical thief would be liable only for ordinary loss.

According to the view expressed by R. Beṣalel Ashkenazi in his *Shittah Mekubeṣet*[233] a taking with a view of returning the article to the owner would not make the taker a thief proper, and would therefore limit his liability, while according to Maimonides he would be a thief proper, and therefore liable even in case of *ones*.

XI

"STEALING OF THE MIND"

The law has thus far treated dishonesty as a wrong, only when it took the form of an actual damage to one's possessions. But it also regards dishonesty as affecting the public weal, whenever a person uses a device calculated to deceive.

The stealing of another person's confidence is called גנבת דעת[234] *genebat da'at*. The term גנב *ganab* is used in the Bible also in the sense of to deceive[235] or (in its intensive form, Piel) to win over through blandishments.[236] In the Talmud גנבת דעת[237] acquired the special meaning of using dishonest means in order to create a favorable impression.

owner of the article but knowing that he would not accept support, he commits the wrong of stealing to entitle him to double compensation. Cf. Chaim Heller ספר המצות, 110, Note.

[233] End of Baba Meṣia, chap. III.

[234] Ḥosh. Mish. 228. Cf. Felix Perles, Jüdische Skizzen, Leipzig 1912, p. 121 ff; also re prohibition of "reservatio mentalis" on taking an oath in Court.

[235] Gen. 31; 20, 26.

[236] 2 Samuel 15, 6.

[237] Similarly Baba Meṣia Pereḳ 4 Mishnah 12 גנב את העין; he deceives the eye, creates a false impression.

This was forbidden even in conventional intercourse. Rabbi Meir e. g. forbids to extend an invitation to someone whom you know to be unable to accept it, or to bring him presents if you know that he will decline them. Similarly a merchant shall not pretend opening a new cask for the sake of his customers if he would have done it in the ordinary course of business.[238] It is interesting to note that adulteration of food is also prohibited for the same reason.[239]

A person guilty of the offence of stealing another person's confidence is branded as thief and, according to a saying of the Rabbis, has committed a wrong as great as if he had tried to deceive God himself.[240] This prohibition is to be considered even in dealings with a heathen.[241]

XII

THEFTS COMMITTED BY PERSONS NOT SUI JURIS

A. Woman

The sanction of *kefel*, etc. is enforceable by and against both men and women, the Talmud laying down the rule that women are on the same footing with men in respect to all wrongs which are mentioned in the Torah[242] i. e. they are in general subject to the same sanctions and entitled to enforce in their own right the same compensations.

[238] Ḥullin 94a; Tosephta Baba Kamma Chap. 7, 8–9 (edition Zuckermandel 358). Mekilta Mishpatim 13 (ed. Friedman 89b).

[239] Cf. Löw, I. Aramäische Pflanzennamen p. 317 Anm. 2; Moore, Judaism II p. 142.

[240] Mekilta and Tosephta Baba Kamma ibid. Shebu'ot 39a (according to Haggadic interpretation of Zach. 5, 4).

[241] Ḥullin 94a. Cf. Jacob Z. Lauterbach, The Attitude of the Jew towards the Non-Jew (Y. B. C. C. A. R. XXXI) pp. 21, 47 notes 47–50.

[242] Baba Kamma 15a; Maim. Hilk. Geneb. 1, 7; Ṭur and Shul. Ar. Ḥosh. Mish. 349, 1.

This principle was not changed in the case of married women who possessed property in their right.[243] In this case the property could be attached for the payment of the sanction. The dowry and paraphernalia which a woman brought in on being married were sometimes increased by property which was given to her on condition that the husband be not entitled to derive benefit from it during her lifetime, and that it do not devolve upon the husband at her death.[244] From such property then the sanction could be collected even from a married woman, during coverture.

In case such property was not available the Court's decision remained suspended until the woman became a widow or was divorced, in which case the sanction was repayable out of the amount of her legal marriage portion.

If, however, the article stolen was still in existence, or in case it had been sold or bartered against another thing, the

[243] Both in Babylonia and Palestine it was the invariable custom, traceable to Biblical times, for the relatives of an unmarried woman to provide her with dowry. In the Talmud the terminus technicus for it is מזונות or פרנסה (from the Greek προνοῖσαι), or its equivalent נדוניא (derived from the Babylonian; but Cf. נדה Ez. 16, 33). A record of all property thus brought in by the married woman was entered into the marriage contract and was insured by a first lien on all the man's property. Hence dowry (to distinguish it from "paraphernalia") was called in the Mishnah (Yebamot 66a) צאן ברזל, *son barzel*, pecus ferreum. In addition to the dowry which during the continuance of married life became practically the husband's property repayable on death or divorce, the woman possessed property (originally) entirely in her own right. This property is known in the Babyl. Talmud under the term נכסי מלוג *nekese melug* (from the Babylonian "mulugu" which Delitzsch translates with "Mitgift" but Peiser more appropriately with "Frauenbesitz" = Women's property). In the Palest. Talm. the term פרא פרנון, from the Greek παράφερνον is employed. Although, on principle, the woman was in unrestricted use and authority over this kind of property, the husband under certain conditions and for certain purposes was given a usufruct in it, e. g. to assist her in the management or ad sustinenda onera matrimonii. This extension of the husband's rights was closely watched by the law to prevent his misusing them. Cf. L. Freund, Zur Geschichte des Ehegüterrechts bei den Semiten, Wien 1909, p. 38 ff.

[244] Eben ha-Ezer 92.

quid pro quo could be secured, the stolen article or the equivalent of it had to be returned. The owner thus could "follow his property." It was only when the article had been destroyed or was not procurable that the value or barter was returned to the owner, the *kefel* remaining an additional sanction to be exacted.[245]

B. Minors and Mentally Incompetent

Thefts committed by persons regarded in law as not compos mentis i. e. by minors, mentally defective or deaf and dumb individuals are not subject to punishment. Although the physical part of the crime, the actus reus, might have been completed, the component element of mens rea or criminal intention being absent, the wrong remained inchoate and created no criminal responsibility.

The acts of such individuals create no obligation whatsoever. If therefore in course of time the minor should become a major or the mentally defective be cured of his disability, they could not be made responsible for the wrongs committed before.[246]

But even in these cases the article stolen will be followed by the Court and returned to its owner.

C. Slaves

If a theft is committed by a slave,[247] he is liable for the double compensation. This in case he possess property which cannot be legally reached by his master e. g. if a gift of property were made to a slave on condition that he pay the compensation and it be touched by nobody else.

[245] Maggid Mishneh to Maim. Hilk. Gen. 1, 7; Baba Kamma 87a.

[246] Baba Kamma ibid; Maim. 1, 8; Ṭur and Shul. Ar. Ḥosh. Mish. 349, 3.

[247] Maim. ibid. l, 9, 10; Ṭur 349, 3 and Sh. Ar. Ḥosh. Mish. 4.

Otherwise the sanction remains suspended until the slave is released.

The principle of the vicarious responsibility of the master for the wrongs of the servant is refuted, "A master is not responsible for damage caused by his slave, although he is his money (i. e. all the slave's work belongs to the master), for the slave is *compos mentis* and it would be impossible for the master to guard him."[248] This rule has its counterpart in the modern doctrine of a master's liability being restricted to acts done by the servant "while in the course of his employment."

But while monetary punishments in case of both slaves and minors are thus either completely excluded or postponed, the Court is given authority to punish them bodily, in proportion to their physical strength, in order that they may not accustom themselves to stealing.[249]

XIII

THE ORDINANCE OF MARKET OVERT

תקנת השוק

According to the accepted opinion, the buying of a stolen article from a thief, after the abandonment of every right in it by the owners, *ye'ush*, has been established, acts as a recognized mode of acquisition, giving the buyer a good title. (According to Maimonides the priority in time of such abandonment to the 'change of possession' is not

[248] Maim. ibid.

[249] Ibid. Concerning the Roman Law on theft by slaves see J. B. Moyle, Imperatoris Justiniani Institutionum Libri Quattuor, Oxford 1883 p. 505, Note, and the same author's translation of the Instit. Oxford 1913 p. 219 s. v. "theft."

essential). There exists a presumption that in case of theft the abandonment follows as a matter of course.[250]

If however the buyer had received the article and the theft is discovered before its abandonment by its owners, according to the strict law[251] he ought to return the object to the owners without a claim of recoupment for the price he had paid for it. His only remedy then would be to get compensation from the thief.

But in the interest of commerce a Market Ordinance[252] was introduced limiting the rigour of the law to cases in which the 'good faith' of the buyer was absent. Where, therefore the buyer acted in good faith in open market, without knowledge as to the suspicious circumstances surrounding the person of the vendor or the acquisition of the article, the Ordinance[253] provides that he return the article to the owner and be recouped by them for the price[254] he had paid. This ordinance was considered necessary in

[250] This acquisition of a stolen article after change of possession and *ye'ush* irrespective of the notoriety of the thief, is a very remarkable modification of the principle דבר שאינו שלו אינו יכול להקנות nemo plus juris transfeire potest quam ipse habet. (Baba Kamma 115a) This explains the minority opinion of Maim. that, even after *ye'ush* and *shinnuy reshut* the buyer of a notorious thief ought to return the value of the article. Cf. the last section of 'Dina De Malkuta Dina' (Ante Ch. VI).

[251] Baba Kamma 66a and 114a; Ḥosh. Mish. 353 and 361.

[252] As to the character of such Ordinances or *takkanot*, see Mos. Bloch Introd. to his ספר שערי תורות התקנות Wien-Budapest 1873–1906 and Maim. Introd. to his Commentary on the Mishnah.

[253] Baba Kamma 115a. Maim. Hilk. Gen. V, 2. Cf. J. Jacobs, Jewish Contrib. to Civil. p. 215.

[254] Acc. to Maim. l. c. if there be no evidence as to the amount he paid, the buyer is entitled to state it on oath and collect it from the owner. If the acquiring party had not paid the thief but taken the article in lieu of a debt, the owners recover it without recoupment. Similarly if the thief had paid with the article stolen his debt to a store-keeper, the Ordinance does not apply. The owners recover it free of compensation, and the creditors of the thief are left to their remedies.

the interest of trade,[255] protecting unsuspecting persons and removing what would otherwise prove an unsurmountable obstacle in the conduct of commerce.[256] The owners are left to their remedies against the thief.

[The Ordinance does not apply to thes ale of immoveables on the principle[257] קרקע אינה נגזלת *ḳareḳa' ena nigzelet* 'an immoveable cannot be robbed,' i. e. landed estate remains legally in the possession of its rightful owner who can claim its restitution in natura without recompensing the holder, even if it had been sold after *ye'ush*].[258]

If, however, the goods had been obtained from a notorious thief, although they have been bought in open market and there were no suspicious circumstances surrounding the particular article bought, the Ordinance does not apply. For the fact that the vendor was known as notorious thief, ought to have put the buyer on his guard and he therefore bought the goods at his own risk. On the claim of the owner he has to return them in natura without any compensation and is left to his remedy against the thief.[259]

[255] SHaK ad Ḥosh. Mish. 356, 5, quotes some authorities who are in favour of extending the benefit of the Ordinance to gifts, on the argument that gifts are usually based on some consideration, and hence equal to things bought. But the accepted opinion limits the Ordinance to commercial transactions.

[256] For, unless protected by the Ordinance, people would be afraid to buy goods from others who might have stolen them; in the case of the discovery of the theft, they would be dispossessed of the goods and would have to return them to the owners without recoupment or, at least, they would be involved in a law-suit with the vendor-thief.

[257] Sukkah 30b; Ḥosh. Mish. 371, 1.

[258] The Ordinance does, however, apply to the sale of slaves, who in other respects are treated like immoveable property, and to the sale of cattle. Cf. Keṣot ha-Ḥosh. to Ḥosh. Mish. 356, 5.

[259] Baba Kamma ibid. and cf. Asheri ad loc. He recovers from the thief on taking an oath as to the amount paid; the thief being unable to counteract it by his oath, on the principle חשוד אממונא חשוד אשבועתא i. e. his criminal character invalidates his evidence on oath.

The notoriety of the vendor must refer to his character as a thief;[260] bad reputation in other respects will put him on the level with a non-notorious thief and the Ordinance will apply in favour of the buyer.[261]

The Ordinance applies also when the thief had pawned the article stolen. The owners, on repaying the pawnbroker the amount of the loan, recover their property and can proceed against the thief.

But, as in the case of a buyer in open market, the Ordinance interferes only in the case of a bona fide broker who has no reason for suspecting either the character of the pawner or of the goods pawned.

The fact that the broker advanced the pawner a loan in excess of the value of the pledge, in itself may not be taken to imply the waiving by the broker of the usual commercial security and his reliance on the person of the thief so as to exclude the Ordinance. For in such cases the broker may have known that the pawner would redeem the pledge.

Whereas the owners may have to recoup the broker in excess of the market value of the article, they are not responsible for the debt of interest on the loan that the thief may have incurred.

[260] Baba Kamma 115a, תנן בישא. . . דמפורסם לבישותא, לגניבותא לא מפורסם and SHaK ad Ḥosh. Mish. 356, 6.

[261] In the same way, if an article was bought of an unsuspected thief, the fact that the price paid was far below the market value does not in itself give rise to the presumption that the buyer was aware of the article having been stolen; for sometimes the need of money compels the vendor to sell at a lower price.

In general it is left to the discretion of the judges to decide whether the circumstances of the case warrant the extension of the Ordinance, or whether suspicious circumstances vitiate the fides of the buyer. Cf. Aruk ha-Shulḥan, 356, 11.

Similarly, if an artisan has pawned the articles he had received for repair, the owners, on recovering them, can be made to repay only the principal and, as a rule, not the interest.[262]

The Rule of Market Overt in English Law*

According to English law the theft of a physical object leaves the right of ownership intact, so that the owner is still entitled to seize upon the thing or to bring an action to recover it from the thief.

There is an apparent exception to this where the thief has proceeded to destroy the thing, or even irrevocably to alter its essence by making an entirely new kind of thing out of it. In the latter case, the typical *specificatio* (cf. Justinian, Inst. II. 1. 25–29,) of the Roman law, and the *shinnuy ma'aseh* of the Jewish Law, (see ante chap. V (f)) he acquires title by his conduct posterior to the theft and not by the theft itself.

Since a thief does not become owner, he cannot confer ownership upon anyone else, for "nemo plus juris transfere potest quam ipse habet." Hence the original owner may sue the thief or anyone to whom the thief has given or sold the stolen article, to recover it or its value.

But upon this general principle "nemo dat qui non habet" the Common Law soon engrafted two exceptions, which the necessities of trade had shown to be indispensable for the security of purchasers. One depends upon a peculiarity in the place where the purchaser buys it. A man

[262] This, however, depends on local custom. Cf. ReMA ad Ḥosh. Mish. 356, 7 an application of the principle Dina de-Malkuta Dina. Cf. Ch. Heller op. cit. Chapter 145.

* (See Kenny, Outlines of Criminal Law, Cambridge 1916, 223 ff. Pollock and Maitland, History of English Law, Cambridge, 1911, Williams, Personal Property, 17th Edit. London, 1913 ,p. 588).

who in all ignorance of the theft gives the thief valuable consideration in exchange for the stolen property, may, in spite of its having been stolen, acquire a good title to it, if either (cf. Justinian, Inst. II. 1. 25–29) this stolen property consisted of money or of a negotiable security or if it was transferred to him in a 'market overt.'

"Fairs and markets brought together men from places so distant that, in medieval days, the purchaser had little means of knowledge about the vendor he dealt with there, and consequently he needed the protection of some legal privilege. Hence it became settled that even the most ordinary chattels might be effectually alienated by a mere thief, if he sold them for value to a bona fide purchaser on a market day, in such a place as was a lawfully established market for the particular kind of goods concerned, e. g. cattle or corn or cloth. And the publicity and rarity of the privileged occasions made this exceptional rule work comparatively little injury in the way of encouraging thieves."

But modern facilities of intercourse have lessened the need for this protection; and, accordingly, modern legislation has restricted its completeness. For now, even when the original ownership has been divested by a sale in market overt, it will be revested in the old proprietor (Larceny Act 1916 s. 45, "but only from the date of conviction." Hence intermediate dealings are not affected and do not amount to conversion), if the thief, or guilty receiver be *convicted* of the stealing or receiving.

Hence after a conviction for larceny the owner is sure to be able to sue for restitution, except in the case of money or a negotiable security. And even in this excepted case, if the thief had spent the proceeds of the theft in buying some article, the owner of the money may seize that article, and the thief cannot recover it from him. (C Cattley v. Loundes, 2 T. L. R. 136). Thust he owner may

'follow his money' even into the subsequently purchased goods which represent it.

Blackstone's account of this law (Commentary on the Law of England, London 1825, vol. II, 449, ff.) is very instructive: ". . . . . But property may also in some case be transferred by sale though the vendor has none at all (in the latter case Blackstone uses—the term 'property' for 'right of property,' in the former he uses it for 'physical object') in the goods; for it is expedient that the buyer, by taking proper precautions may at all events be secure of his purchase. Otherwise all commerce between man and man must soon be at an end and therefore the *general rule* of law is that all sales and contracts of anything vendible in fairs or markets overt (that is open) shall not only be good between the parties but also be binding on all those that have any right of property therein. Market overt in the country is only held on the special days provided for particular towns by charter or prescription but in London every day except Sunday is Market day. The Market place or spot of ground set apart by custom for the sale of particular goods is also in the country the only market overt. But in London every shop in which goods are exposed publicly to sale is market overt for such things only as the owner professes to trade in.

But if the goods are stolen from me and sold out of market overt, my property is not altered and I may take them wherever I find them and it is expressly provided by Statute (1 Jac 1 ch. 21) that the sale of any goods wrongfully taken to any pawnbroker in London shall not alter the property, for this being usually a clandestine trade is therefore made an exception to the general rule . . . . . .' So likewise if the buyer knoweth the property not to be in the seller, or there be any other fraud in the transaction, if he knoweth the seller to be an infant or femme covert not

usually trading for herself; if the sale be not originally or wholly made at the fair or market or not at the usual hours, the property is not bound thereby. If a man buys his own goods in a fair or market, the contract of sale shall not bind him so that he shall render the price, unless the property had been previously altered by a former sale. And notwithstanding any number of intervening sales, if the original vendor who sold without having the property, comes again into possession of the goods, the original owner may take them when found in his hand who was guilty of the first breach of justice; by which wise regulations the Common Law has secured the right of the proprietor in personal chattels from being divested so far as was consistent with that other necessary policy that purchasers bona fide in a fair open and regular manner, shall not be afterwards put to difficulties, by reason of the previous knavery of the seller."

From this it can be seen that three things are to be emphasized in the passing of title by a sale in market overt:

1. There must be bona fides on the part of the buyer.

2. The goods must be of the kind usually dealt in the Market.

3. Publicity of Sale. The goods must be openly exposed so that anyone passing by may see them, or at any rate, where shops as in the City of London are market overt, that anyone passing may enter the shop and see the goods if he takes the trouble to do so.

Cf. Clayton v. Levy, 2K. B. (1911). The portion of Scrutton J. judgment dealing with the history of the development of the Market Overt Rule is of great interest, p. 1038 ibid). Cf. also Hargrave v. Spink K. B. 25 (1829), where the judge expressed the obiter dictum, generally accepted as sound, that the rule only applies to sales by the shopkeeper and not to sales to the shopkeeper.

An innocent purchaser against whom a restitution order is made, may ask the Court to compensate him by returning him, out of any moneys that have been taken from the prisoner on his apprehension, the amount of the price which he had paid.

Can a Thief Acquire or Transfer Property According to Roman Law?

We have seen that certain cases, both in Jewish and English law, admit the acquisition of a title by the thief, e. g. in the case of a permanent change of the species of the article stolen by the labour thief, the '*Shinnuy she'eno ḥozer li-beriyato*' of the Jewish law. The latter goes even further than that and recognizes the change of the article by natural forces, e. g. change of a young lamb into a ram, etc. In all these cases the acquisition of the title by the thief carries with it the concomitant obligation of compensating the owner.

According to Roman law, however, specificatio acts as a mode of acquisition only in the case of a bona fide taker e. g. if a workman took the material in good faith thinking it was his own, but not if he acted with evil intent, if he was a thief. (Just. Inst. II. 1 25ff, Gaius II, 79.

The Roman Law provided that certain defective titles could be cured by prescriptio, i. e. the lapse of time. This prescription ('acquisitive' denoting the acquisition of a right by lapse of time, 'extinctive' the extinction of a right) was suspended absolutely in the case of stolen things. Stolen things and property taken possession of by violence can never be acquired by adverse possession by the thief, who is for ever barred from obtaining a prescriptive title no matter how long is his possession. For his possession was acquired mala fide and will forever remain so.

According to Markby, (Elements of Law, Sect. 582, quoted by Sherman in his 'Roman Law in the Modern World, vol. II, p. 222), English law differs from the Roman. Markby criticizes an English decision holding that the commencement of possession must be bona fide, i. e. peaceable and open.

Third Parties

A third party obtaining the property in good faith from the thief or wrongful ejector was not disqualified from acquiring it by prescription. (Cf. Sohm, Ledlie's transl., Roman Law p. 321. Baron, Pandekten; 286, l 3).

There is no institution in Roman Law similar to Market Overt in English Law or the תקנת השוק in Jewish Law.

XIV

THE RECEIVING OF STOLEN PROPERTY AND MALA FIDE PURCHASES

"It is not the mouse which steals, but the hole,"[263] i. e. if the thief would not be sure in finding an accomplice to receive his stolen goods and to dispose of them, he would refrain from stealing. Hence, it is unlawful to receive stolen goods into one's possession or to buy them from the thief, though, technically speaking, the taking by one of the modes of *ḳinyan* would not amount to a taking from the owner, and consequently the taker could not be punished as *ganab*. The wrong consists in the assistance given to the thief.[264]

[263] Arakin 30a לאו עכברא גנב אלא חורא גנב.

[264] Cf. Maim. Hilk. Gen. V. "It is forbidden to buy from a thief a thing which he has stolen and this is a grave sin, for one thus strengthens

According to the Code of R. Jacob B. Asher,[265] one should not buy anything from one who is known to be a thief, as this amounts to rendering him assistance in his wrongs. Therefore, if an artisan is requested to perform certain work which from the nature of it is likely to be of help in stealing, he must refrain from doing it.[266]

Similarly, if a married woman requests a locksmith to make keys without the knowledge of her husband, there is a presumption that she intends using them without his consent.[267] Rabbi Gershom,[268] in his proclamation against the receiving of stolen property from non-Jews, suggested the application of the strongest measures against the offenders, probably the *Ḥerem* or excommunication, which throughout the middle ages was extensively used as an effective religious sanction.[269]

Not only the striking of a bargain about stolen goods is prohibited, but also the use of them, even if their abandonment by the owners has been established.[270]

the hands of the evildoer, and concerning such an act, it is said (Prov. 29, 24). "He who divides (the spoil) with a thief hates his own soul."

Some Karaite authors think (cf. אשכול הכפר by R. Yehuda Hadasi, Eupatoria 1836, quoted by Tschernowirz op. cit.) that גנב is a generic term comprising both the case of one who is an associate of a thief and of one who receives and conceals stolen goods. They deduce it from the plural used in the biblical verse prohibiting theft (Lev. 19, 11, לא תגנבו). But that argument cannot be upheld, since all the laws in this section are expressed in the plural; eg. you shall not lie.

[265] Tur Ḥosh. Mish. 369.

[266] Turĕ Zahab to Ḥosh. Mish. (commentary by R. David b. Samuel ha-Levi of Lublin, 17 century). 356, 1.

[267] SeMA ibid.

[268] The "Light of Diaspora," b. Metz 990; died Mayence 1040. Cf. Jew. Enc. V. 638.

[269] Cf. J. Wiesner, Der Bann in seiner geschichtlichen Entwicklung, Leipzig, 1864 p. 39, 45. L. Finkelstein, Jewish Self-Government in the Middle Ages, New York 1924 p. 7 ff.

[270] Hosh. Mish. 369, 4.

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Mala Fide Purchases[271]

The Jewish law aims at protecting the innocent purchaser who, without knowledge of the suspicious circumstances attaching to either the goods bought or to the person of the vendor, buys articles in open market, i. e. through the usual channels of trade. On the other hand, it aims at removing the facilities for committing the wrong of *genebah*, by prohibiting the buying of articles known to have been stolen, or those concerning which there is a presumption of their having been gotten by illicit means, stealthily or without the consent of the owner.

The following are examples in which there exists a presumption, against the bona fides of sales:

It is prohibited to buy from shepherds any wool, milk, lambs or kids,[272] as there is a presumption that they took these things without the consent of the owner; but one may buy of them milk or cheese in the wilderness where there is a presumption that the owners had charged them with the sale, it being too troublesome to bring these articles to an inhabited place.[273]

One may, however, buy from shepherds a small number of sheep[274] (e. g. four from a small flock or five from a large flock) as it is assumed that the owners are well able to keep track of such numbers. The same applies to the buying of fleeces of wool from them.

The general principle in these and similar cases is that whenever it may be assumed that the shepherds' sales can be controlled by the owners, the purchases are permitted; if not, one may not buy of them, as there is a presumption as

[271] Ḥosh. Mish. 358.

[272] Baba Kamma X, Mishnah 9.

[273] Ṭur Ḥosh. Mish. 358. One may buy of them wool and kids in inhabited places but not in the wilderness; in the latter case the presumption of mala fides is against them.

[274] Cf. Baba Kamma 118b.

to the selling of such things without the knowledge of the owners.

Though it is forbidden to buy an article which might have been stolen, there is a controversy between Rab and Samuel as to the conditions under which it is permitted to derive advantage from the goods of one who is known to be a robber. According to Samuel, if he is known to have acquired part of his property by lawful means, one may accept payments from him in settlement of a debt.[275]

It is equally forbidden[276] to buy fruit of a person who is in charge of a fruit garden, or timber from one in charge of a timber-yard, except when the sale proceeds openly and publicly e. g. at the entrance of the garden and not in a side alley,[277] and the articles are weighed or measured as in market overt. The same presumption exists with reference to any other articles which the purchasers are warned to hide when removing them, וכולן שאמרו להטמין אסור[278] which is taken as a strong presumption of their having been stolen; but is permitted to buy such things from an אריס *aris*[279] from a gardener who usually received from the owner a proportionate part of the produce for his work, אריס דאית ליה בנווייה אימת מדנפשיה קא מזבין for he is known to be a part owner of the fruits and the timber, and may be assumed to sell of his property. Rabbi Jacob b. Asher[280] maintains that without knowledge to the contrary, we may assume that the sale was effected after the *aris* had severed his contractual connection with the owner and received his part. The same presumption prevails according to R. Joel

[275] Ibid 119a גזלן מאימת מוהר לקנות הימנו. The RIF and RoSH read לגבות which seems more likely. Cf. Ḥosh. Mish. 369.

[276] M. Baba Kamma X, 9.

[277] Ibid 119a.

[278] M. Baba Kamma X, 9.

[279] A tenant of a long lease; אריס from οἴρος, overseer.

[280] Ṭur Ḥosh. Mish. 358, 4.

Sirkes if the *aris* takes such articles from his own house.[281] These authorities reject the extremer view which prohibits buying from the *aris* unless it is definitely known that he had already received his part.

Purchases from married women,[282] slaves and minors[283] are prohibited when it can be assumed that they had no authority to sell; but one may buy of them certain articles which usually are transferred to them for sale with the consent of the owners.[284] If a woman acts as the business agent of her husband and sells his goods openly, one may buy of her. Poultry may be bought at any place, but if the vendors sell secretly, the purchase is prohibited.[285] Charity may be taken by the treasurers from women without the knowledge of their husbands, if the amount is "small" compared with the fortune of the givers. This is brought out in the case of Rabina[286] who was a treasurer of charity: He happened to be in the city of Meḥuza and the women gave him golden chains and rings for charity and he accepted. Said Rabba Tosphah to him: "Did not the Boraita state that a large quantity must not be accepted from the women by the treasurers of charity?" And he answered: "For the people of Meḥuza this is considered a mere trifle." (Because they were very rich).

One may buy of an oilpresser (i. e. one who is engaged to press oil for the owner) large quantities of olives and oil in open market,[287] but not small quantities, which they are presumed to steal.

[281] Cf. BaḤ ibid.

[282] Baba Kamma 118b, Mishnah; ibid 119a.

[283] Ibid.

[284] e. g. one may buy from the women of Judaea woolen garments, (which usually were manufactured by them), and flax garments from those of Galilee, and also calves from the women of the city of Sharon.

[285] Cf. Perisha ad Ṭur Ḥosh. Mish. 358, who explains the word מידה in לוקחין מהבדדין זיהים או שמן במידה to mean "selling in public, and considerable quantities which they could not easily steal."

Similarly, the wool which the cleaner removes from woolen cloth he may keep for himself. It is not considered theft, because as the value thereof is so small, the owner is presumed to have no objection. But with the wool comber it is different. He has to return to the owner all wool that comes out of the yarn by means of the comb.[286]

With respect to weavers, tanners, tailors, joiners, cabinet-makers, etc., who have materials given out to them for making up into goods, if any of the materials should remain over and above the required amount, local custom or the attitude of the owner decides what should be returned to him and what they may keep.[287]

In all such cases the buyer ought to pay attention to the circumstance of the case. It is enjoined upon the Court to punish those that support illicit trade. In one case, quoted by ReMA[288] a woman who offended against these provisions was punished by the Court enjoining men not to marry her, as by doing so they would support a wrongdoer.

Note C. Ownership and Possession

The conception of ownership as the most comprehensive right which a person can have with respect to an object is in all legal systems contrasted with a condition of fact, viz. the actual possession of the thing irrespective of any rights connected with it.

In Roman Law, and in those modern laws that are based upon it there is a clear distinction between *dominium*, the right of ownership over a thing, and *possessio*, the physical act of possessing it.

Possessio in Roman Law is defined as a relation which consists of two elements:

[286] Cf. Baba Kamma 119a, Mishnah.
[287] Ibid 119b; Hosh. Mish. 358, 10.
[288] Ḥosh. Mish. 358, 5, from the Piskĕi MaHaRIK (R. Joseph Kolon).

(*a*) *Detentio*, i. e. physical power of dealing immediately with a subject and excluding any foreign agency, and

(*b*) *Animus Domini*, on the part of the detainer, i. e. the intention of holding it as a proprietor, of dealing with it as its owner against the world.

Possessio is a recognized legal status which is protected by the Law against interference by anyone, independently of the fact whether it was brought about by lawful means or not. (Cf. Pollock & Maitland, History of English Law, 2nd Ed. Cambridge 1911, II, p. 32, ff: "The term 'Seisin' in early English Law was of a highly technical character. It seems to have the same root as the German 'Besitz' and the Latin 'Possessio.' Seisin was used for all manner of things. Persons are 'seized' of chattels and in Seisin of them, i. e. they were possessed of them. The Law recognized and protected their possession; even if the chattels had been stolen, the thief was 'seized' of them. Seisin has by Heusler been compared to German 'Gewere'".)

"It should be carefully marked that 'animus' is an intention; it has nothing to do with a belief that one is owner (opinio or cogitatio domini) for the possessing thief or robber is as capable of the animus domini as the most innocent possessor, and is as fully entitled to the protection of interdicts as the latter; 'adversus extraneos vitiosa possessio prodesse solet' (Dig. 41, 2, 52). In other words, possession is independent of bona fides; 'it is possession whether iusta or inusta;' the ius possessionis, the right involved in possession, the right protected by interdicts, is quite distinct from and independent of the ius possidendi, or right to possess which belongs not to the Law of possession, but of ownership." (Moyle, Justinian, Oxford 1883, p. 322; L. 2, D. 43, 17).

Apart from this protection by interdicts, the possessor (if his possession originated in iusta causa) may acquire full

property rights over the article through *usucapio*, if the article remain in his possession for a certain length of time, i. e. the fact of possession may cure a defect in title. (Instit. II. 6).

It is thus clear that possession entirely distinct from ownership receives protection in Roman Law.

In English Law the definition of possession is slightly modified. Possession in law exists when a person exercises on his own behalf effective control over a thing, coupled with an intent to exclude others from the use and enjoyment of the thing. Thus: *animus domini* is not necessary in English Law; e. g. a tenant of land for years has legal possession, though he has no intention to hold as owner. Similarly, a bailee has possession in law, a servant has not. (See Williams, Pers. Prop., 17 Ed. pp. 22, 56ff).

In English Law the thief or *mala fide* possessor has a legal (though unlawful) possession and taking from him would be theft.

The Jewish Law also keeps the right of property and the fact of possession clearly apart. (Baba Batra Perek III. Mishnah 3). But in contradistinction to the laws quoted, it does not afford unqualified protection to possession. *Mala fide* possessors like thieves, robbers or trespassers, (i. e. who "borrow an article without the owner's knowledge)," are not protected in their possession by the law. Their relationship to the articles kept is one of mere 'detention' and a taking by others of such an article without their knowledge would, in Jewish Law, not amount to the wrong of *genebah*. Nor does the Jewish Law make provision for an institution similar to the Roman *usucapio*. Detention cannot by lapse of time ripen into a full legal title.

Jewish law does not accord protection to possession, unless it be based upon a *iusta causa*, (e. g. a bailee's holding), or unless it be accompanied by the presumption of

'*ḥazaḳah*' which, if not contradicted, and supported by a *iustus titulus*, takes to all intents and purposes the place of property; but '*ḥazaḳah*' in itself does not create or cure property rights.

Ḥazaḳah never appears as a separate claim, it always accompanies as a presumption the claim of ownership which it supports. It does not appear in support of mere physical possession. Hence, '*ḥazaḳah*' may not be identified with *possessio* in Roman Law. (See post-sub. "Proof: (A) Presumptious V.")

There is an apparent exception in which the fact of possession as such seems to be recognized and protected by the law. (Baba Batra, 34b). Two persons claimed a boat, each averring that it was his property. The judge (R. Naḥman) decided that the ship should be the property of the one who seized it first, כל דאלים גבר, *kol de-alim gebar*

But it is clear that this decision was the only alternative in a litigation in which both parties produce evidence apparently of equal force, and the object is not possessed by either of them. The judge's decision, in fact, retains the status quo till more evidence is produced and does not attempt to solve the question of rightful possession or ownership.

XV

STEALING FROM A THIEF

The wrong of *genebah* is committed only by taking an article from the possession of the owner, or from one who, in law, is regarded as owner ad hoc, e. g. a bailee.

In both cases, the *kefel* is paid as a sanction for the violation of the right of possession.

But if one steals an article from a thief, this consideration does not apply. For one who violates the sanctity of property right is not entitled to invoke the protection of the law. He is not regarded as an "owner;" as the thing stolen legally remained in the power of the real owner, the second thief does not commit the wrong of taking "without the owner's consent."

Hence, if convicted, the second thief is liable to simple restitution only and not to *kefel*, which is a compensation that can be claimed only by the owner; but if the first thief should have become owner of the article, e. g. if he had acquired it through *shinnuy*, specificatio, or the like,[289] then the second thief naturally would have to pay *kefel* to him.[290]

But to the original owner he would in no case pay *kefel*, inasmuch as his guilty mind did not contain the intention of stealing it without the true owner's consent.

XVI

RESTITUTION

A. Voluntary

The thief is under the legal obligation of returning the article stolen as long as it is in existence, whatever its condition may be.[291]

(a) If the theft be known to the owners, the thief's responsibility for the article taken does not cease with its

[289] But he would, as mala fide possessor, not acquire it through mere *ye'ush* (abandonment) by the owner.

[290] Baba Kamma 67a.

[291] The strictness of this law, deduced from the wording of the biblical command, has been modified by the "Ordinance in favor of the Penitent." R. Ḥiyya bar Abba in the name of R. Joḥanan (Baba Kamma

mere restitution; he remains liable for it[292] until he informs the owners of his actus reus and of the return of the article.[293]

Such information may take place after the restitution and it may be direct or even indirect. If, therefore, Reuben stole from Simeon, but in a later transaction restored it to him by tacit implication, by introducing the stolen money into the aggregate money of the transaction, he is free of his responsibility.[294] But this is the case only when Reuben knew Simeon to be aware of the amount of money actually due on the transaction, for it is assumed that Simeon would recount his money as a matter of course, and thus would be acquainted with the fact that the stolen money had been restored. But if Reuben simply cast the money into Simeon's box, or put it in his pocket where Simeon would be unable to know where the money came from, then Reuben is not free and can be made liable for the restoration of the stolen money until such time as he informs Simeon.

(b) If the owners were unaware of the theft, the restoration of the article to their possession would, in general, free

94b) said, "According to Scripture a stolen thing is to be returned regardless of its condition (although it is changed) as it is written, (Lev, 5, 23). 'He shall return the robbery he has taken away violently (lit. robbed)' (Cf. Rashi ibid." "Even if it be ameliorated, as, according to R. Johanan, *shinnuy* does not give title)." Our Mishnah deviates from this rule solely for the benefit of the penitent. It provides, 'If one has stolen wood and made utensils of it, or wool and made garments of it, he must pay only for the cost of the material at the time it was stolen'." Cf. M. Gittin V. 5; cf. Note (203) ante.

[292] Absolute liability.

[293] M. Baba Kamma X, 8; Hosh. Mish. 355.

[294] Cf. Rashi Baba Kamma 118b לאחר זמן לקח הימנו מקח וכשנתן לו דמים הוסיף עליהם מעות הגזלה והבליע בחשבון, שהיה בוש לומר הרי גזלתך, יצא. "If some time afterwards he bought something of him, and when he paid the price for it he added to it the money he had stolen, and included it implicitly in the account (as he was ashamed to say, 'Here is your stolen thing'), he is free."

the thief from responsibility without his informing them of the restoration.[295]

The above rules (a) and (b) apply only to the case of innanimate objects.

In the case of animals, however, the law is stricter when the owners are not aware of the theft than when they are aware of it. In the latter case, mere knowledge of the restoration of the animal will free the thief. But, in the former, the owners must be informed of both the theft and the restoration before the thief will be freed from responsibility, for the animal now needs special watching, since the thief has accustomed it to separate itself from the flock.[296]

If, therefore, one steals a lamb from a flock, the owners being aware of the theft, and the lamb is later on restored to the flock without the knowledge of the owner, and the lamb perished or was lost, the thief remains liable. If, however, after the lamb is restored, the owner should count the sheep and find the number intact, and thus become aware of the return of the stolen lamb, the responsibility of the thief is at an end; for the owner, being aware of the restoration of the stolen lamb, will now increase his care and watchfulness. If the lamb stolen has special marks that make it easily recognizable in the herd, i. e. if it is speckled or spotted, the mere restoration (where the owner does not count the sheep) releases the thief, for it is a case of 'res ipsa loquitur' and it is presumed that the owner sees it at once.[297]

But if the owner is unaware of either the theft or the restoration, the thief remains liable for the lamb despite the

[295] Baba Kamma 118a; Ḥosh Mish. 355. Since the owners were unaware of the theft, their 'possession' has not ceased.

[296] Baba Kamma 57a and 118b כיון דנקטי להו ניגרא ברייתא בעי נטירותא יתירתא "Since they have become accustomed to going outside (of their stables), they need special watching."

[297] Cf. Maggid Mishneh, gloss ad Maim HilK. Gen. IV. 12; SeMA to Hosh. Mish. 355, 2.

fact that the owner afterwards counts the flock and finds the number intact, until he informs the owner of the theft, so that the latter may take the necessary precautions for protecting the lamb.[298]

Whatever has been stated above concerning *nesciente domino* applies only to theft by a non-possessor, but,

(c) If theft is committed by a possessor, i. e. a bailee, e. g. if he steals an article or an animal entrusted to his care and afterwards restores it to its former place, to resume his bailment, then the law increases his liability to comprise even accident, until he informs the owner of his conversion and returns the article or animal to the owner; for at the moment of his conversion his contract of bailment comes to an end,[299] as there exists a presumption that the owner would not want to leave his property in the hands of a thief.[300]

R. Joshua ibn Boas advanced the argument[301] that in the case in question the restoration by the bailee, inasmuch as

[298] This follows from the interpretation of the Mishnah B. Kamma 118a (near the end of the page) according to the authoritative view of Rab, in Talmud Babli (118a and b ibid), and R. Johanan in Talmud Jerushalmi. Cf. BaḤ ad Ṭur, Ḥosh. Mish. 355, 1, referring to the difference of opinion between Rab, Samuel, and R. Joḥanan: ופסקו דקי"ל דכל רב ושמואל הפוסקים כרבי יוחנן". Cf. also Bet Joseph who quotes ורבי יוחנן הלכה כרבי יוחנן" D. Hoffman, Mishnayoth B. Kamma 43 Anm. 38.

[299] Baba Kamma 118b אמר רב זביד משמיה דרבא, בשומר שנגב מרשותו שיחזיר למקום שנגב קמיפלגי. . . ר"ע סבר כלתה לו שמירתו ור' ישמעאל סבר לא כלתה לו שמירתו "R. Zebid said in the name of Raba: Where the bailee has stolen from his own (physical) possession . . . . R. Akiba holds that his function as a bailee has ceased (and he must notify the owner of the theft and return the article). R. Ishmael, however, holds that he is still a bailee (and when returns the article to the place from which he took it, his own knowledge suffices)." The Halakah follows R. Akiba. Cf. Alfasi ad locum, and BaḤ ad Ṭur Ḥosh. Mish. 355, 3.

[300] Cf. RaSHI ibid. sub. v. ר' עקיבא סבר כיון שנעשה נגב כלתה לו שמירתו, דתו לא מהימן להו בעלים "Since he committed the theft his bailment came to an end, for the owners would not repose any more confidence in him."

[301] In his collection of glosses "Shilte ha-Gibborim" (1554). Cf. Alfasi to Baba Mesia 43b.

it is voluntary and complete, should be regarded as perfect restoration of the status quo ante, both animo et corpore. Maimonides[302] states that it is understood that in the case mentioned the restoration was involuntary and due to the fact that witnesses had seen the theft on account of which the bailee found it necessary to restore the animal. Consequently, the bailment ceases and the bailee remains liable until his notification to the owners.

But it also follows that had the restoration been the result of the bailee's voluntary change of mind, i. e. in the absence of witnesses, the law would assume that the owners are satisfied with the continuation of the bailment, even if the bailee had not informed them.[303] And this applies also to the theft by the bailee of an animal; for, in this case, the argument of "special care" does not hold good, inasmuch as he now resumes its care. This view, however, is opposed by the ReMA.[304]

Maimonides also holds that in the case of טוען טענת גנב *to'en ta'anat ganab* i. e. when the bailee claimed on oath that the bailment had been stolen, while in fact it was in his possession, the general rule, that on conviction by witnesses he cannot be sentenced to double compensation, holds good only when the bailment had not been removed from its place, but, had the bailee actually removed it from its place, he is in law regarded as a thief proper and must pay *kefel* on evidence by two witnesses being produced.[305]

[302] Maim. Hilk. Gen. 4, 10, and Tur Ḥosh. Mish. 355 (3).

[303] BaḤ ad Ṭur ibid. Be'er Heteb ad Ḥosh. Mish. 355, 2, quoting SeMA.

[304] Cf. Ḥosh. Mish. 292, 9.

[305] Cf. Maim. ibid., the RABeD and the Kessef Mishneh, ibid. Our view represents the interpretation given to Maimonides' Halakah by the author of the commentary 'Kesef Mishneh' and others, thus counteracting RaBeD's emphatic זה אינו כלום. From the commentary 'Migdal Oz' ibid. it can be gathered that the true interpretation of this passage was a trying task. ואני אומר כמה דיו נשפך בין הראשונים נ"ע וכמה קנים נשברו

The thief is under the obligation of returning the object taken together with its amelioration.

The amelioration that is brought about by the thief's outlay of money has to be paid for by the owner; and similarly, amelioration that the object acquires naturally belongs to the thief after *ye'ush* has taken place; the owner has to indemnify him for the value of the amelioration at the time of the restitution.[306]

Should the object have been damaged or broken while in the thief's possession, the owner has the option of claiming either the damaged article and indemnification in money for the depreciation in value, or he may leave the damaged article to the thief and demand compensation for it.[307] If, however, the damage to the article is very slight and it can be restored to its former state, or if the damage is nominal, היזק שאינו ניכר *hezeḳ she-eno nikar* then the owner does not enjoy any option and the thief may restore the article to him.[308]

In case of the loss of the article stolen or its depreciation in value, the thief has to restore the value of the article as at the time of theft. This refers even to loss and depreciation through unavoidable accident, for the thief holds the object subject to all risks.

בין האחרונים בהלכה זו. . . ועמד ר'מ ז'ל בשיטת רבותיו ז'ל ובשיטת הגאונים ז'ל ורבותינו בעלי התוס' ז'ל וגם הרשב'א ז'ל כן הסכים. . . ואני לא הארכתי בכאן לנ' טעמים הא' שהראב'ד ז'ל לא נתן כאן טעם לדבריו, והשני, שחבור זה לבנות עשיתי ולא לסתור והשלישי שכבר הוא כתוב בשיטתו. . . "How much ink has been spilled among the former scholars and how many quills broken by later scholars, over this law. . . . R. Moses in his text follows the tradition of his teachers and that of the Geonim which is later continued by the Tosaphists and the RaSHBA. I have not entered into long arguments for three reasons: (1) The RABeD gives no reason for his criticism. (2) It is my aim to build up (i. e. to defend Maim.) and not to destroy. (3) Maimonides' system contains the answer already."

[306] See Ḥosh. Mish. 354 and SHaK ibid. ad sect. 4.

[307] Tur Ḥosh. Mish. 3.

[308] Baba Kamma 97a, Ṭur Ḥosh. Mish. 363.

If the thief has damaged the article by his own hands, he has in fact committed a double wrong, by stealing it and then by damaging it. Therefore his restitution takes as a basis the greater value of the article at either the time of stealing or at the time of damaging.[309]

B. Confession by the Thief

Analogous to the voluntary restitution in fact by the thief, of the article stolen, is the voluntary confession by the thief of the theft committed.[310]

In this case he is under the obligation of returning the principal only. This law is deduced from the rendering of the particular command, which limits the sanction of *kefel*, etc., to the sentence imposed by a Court of Law: אשר ירשיעון אלקים، פרט למרשיע את עצמו.[311] Hence, it is deduced, a voluntary confession imposes upon him the restoration of the principal only.

In order that his confession may be regarded as spontaneous, i. e. the result of a fundamental change in his *mens rea*, it is necessary that he should have arrived at it entirely uninfluenced by any outside cause. If, therefore, he has made a confession and subsequently evidence by witnesses is produced that would have been sufficient to sentence him, he is free, when it has been shown that he arrived at his confession uninfluenced by the possibility of such evidence being produced; his confession, however, must involve the obligation of returning the principal. Therefore, e. g. if he had confessed to having stolen, (which involves the restoration of the principal), the subsequent appearance of witnesses will not alter the sanction.

[309] Ḥosh. Mish. 354, 4 and SeMA ibid. 5.
[310] Baba Kamma 75 a; Ṭur Ḥosh. Mish. 348, 7.
[311] Exod. 22, 8; Baba Kamma 64b.

But if at first he had denied the theft completely, and on evidence being produced by the witnesses refuting him, he confessed to have both stolen and slaughtered (or sold) the animal, and afterwards witnesses appear to his having done so, his confession has not freed him from the payment of the fourfold (or fivefold) compensation. Since his original statement aimed at freeing him completely of any obligation, his subsequent confession is not recognized.[312]

It is further required that the confession take place before a Court of ordained judges[313] and in the Court House. The number of judges authorized to try cases of punitive damages קנס *ḳenas* was three.

Therefore, at the present time, when properly ordained judges are not in existence, a confession would be of no avail. But if the thief should have paid the *kenas* some authorities hold it would not be recoverable, as it is a "naturalis obligatio" i. e. one that is not enforceable but once paid could not be recovered.[314]

[312] Baba Kamma ibid and 64a שהרי פטר עצמו מכלום Maim. Hilk Gen. V; RIF and ROSH ad locum.

[313] The ordination, i. e. the conferring of the authority to act as judge and teacher in Israel was known in Palestine under the term מנוי and in Babylonia under the name סמיכה. The name is taken from Numbers 27[21]23. ויסמך את ידו עליו 'And he laid his hands upon him.' The Tamud (Sanhedrin 13b.) explains that the act of placing the hands upon the head of the ordained-elect was not essential. It consisted in solemnly declaring the candidate סמוך "Samuk" in conferring upon him the title רבי 'Rabbi' and in authorizing him to act as judge in cases involving money fines, דיני קנסות.

This act of ordination could take place only in Palestine. Up to the time of R. Akiba every teacher was authorized to ordain his pupils. Later the assent of the Nasi, the Patriarch, was necessary. (Sanhedrin Jer. 81b. Sanh. Babli 13b.). Judges ordained in Babylonia were not authorized to settle such cases. (Ḥosh. Mish. 1). Cf. L. Finkelstein, Jewish Self Government in the Middle Ages. New York 1924 p. 7 ff. concerning extra Palestinian ordination in the Middle Ages.

[314] Gloss of ReMA ad Ḥosh. Mish. 348, 3.

C. Involuntary Restitution

(a) Monetary Punishment

On evidence of the wrong of *genebah* being produced, the taker is liable to the punitive compensation of *kefel*, double compensation, or, under certain conditions, of the four or fivefold compensation.

(i) The sanction of *kefel*[315] is imposed whether the article taken was animate or inanimate (with the exception of goods belonging to the sanctuary,[316] or certain documents of an evidentiary character which are considered as being of no value per se).

(ii) The sanction of the four or fivefold compensation[317] is imposed for the theft of a sheep or an ox which the thief had killed or sold;[318] it does not apply to the theft of other animals.

[315] Exod, 22, 3; Baba Kamma 62b. Exod. 22, 8. "for every matter of trespass, whether it be for ox, for ass, for sheep, for raiment . . . he whom the judges shall condemn shall pay double unto his neighbour."

[316] Baba Kamma ibid, deduced from רעהו; "he shall pay to his neighbour" i. e. not to the sanctuary. Baba Meṣia 57b.

[317] Exod. 21, 37. From the repetition of "for an ox" and "for a sheep" the Talmud deduces that this sanction is not applicable to the theft of other animals. (Baba Kamma 62b, 67b).

[318] Or transferred by way of gift to another or given to his creditor in payment of a loan or in payment of merchandise sold to him on credit; even where he gives it to another who slaughters it the maxim "qui facit per alium facit per se" applies, or when he sold it to the sanctuary (Boraita Baba Kamma 79a).

In civil and ritual cases the general rule obtains: שלוחו של אדם כמותו "qui facit per alium facit per se," one who acts through another is in law regarded as if he does the act himself; and also with the exception of certain "personal" services, what a man may do in person he may do through a representative. Ḳiddushin 41b and Keṣot ha-Ḥoshen to Ḥosh. Mish. 182.

In criminal cases, however, a person's instructions to an agent sui juris who acts upon them, are not regarded as the act of the principal but as the act of the agent; אין שליח לדבר עבירה. No human authority can be expected to supersede the authority of the divine law which regards certain acts as wrongful. "If the words of the Master and the disciple are at variance whose word shall be obeyed?" (Ḳiddushin 52b).

The goods were attached in the following order:

(1) Personal estate, e.g. money and other moveables. In the absence of moveable property the officer of the Court would attach,

(2) Real estate. The fields, according to their quality were divided into זבוריות *ziburiyot* of inferior quality, בינוניות, *benoniyot* of average quality, and עידיות *idiyot* of best quality. The best quality fields were attached first.

According to Rabina (Baba Meṣia 10b) the principle applies only היכא דשליח בר חיובא, if the act was one forbidden to the agent himself, i. e. not if a priest as principal instructs a non-priest as his agent to perform the rite of marriage.

According to R. Sama the rule is limited to cases where the agent is in full possession of his freedom of action, i. e. does not act under compulsion, דאי בעי עביד ואי בעי לא עביד.

According to Tosaphot (Baba Kamma 79a, sub v. נתנו לבכורות) it is assumed in both cases that the agent is fully conscious of the wrongful character of his act. Hence if the agent takes an animal from another's stable believing it to be the principal's property on whose instructions he acted, the principal is responsible. (An opposite opinion is adopted by SHaK ad Ḥosh. Mish. 348, 6, following Nimuḳe Josef).

There are three exceptions to the rule, אין שליח לדבר עבירה, i. e in these three cases the thief is liable for four and five fold even if the animal is slaughtered by another who knew of the theft.

(1) Conversion, שליחות יד. Any hostile movement against the bailment, be it done by the bailee himself or by another on his instructions, makes the bailee responsible. His responsibility is increased to cover even accidental loss. This follows from the peculiar contract of bailment which imposes upon the bailee the duty of guarding it against any outsider. Baba Meṣia 45a; Ḥosh. Mish. 292; cf. ante ch.

(2) Trespass by mistake, מעילה. If one mistakenly gives instructions to another to take sacred property and use it for profane purposes. The principal is responsible even if his agent knew of the sacred character of the article. This follows from the nature of the offence. See Kidd. 42b, Tossaf. שליח שעשה שליחותו בעל הבית מעל אפי' נזכר השליח.

(3) In case a thief has a stolen ox or sheep slaughtered by another, the thief and not his agent is responsible. This results from the fact that the killing or selling is regarded as the continuation and completion of the crime of the theft. Hence the original taker is responsible. Tradition deduces this rule from the text, (Baba Kamma 71a) וטבחו או מכרו' מה מכירה ע"י אחר אף טביחה ע"י אחר, just as the sale necessarily presupposes the cooperation of another, so also the slaughtering mentioned in the text has the same legal effect, even if done through another.

This was deduced from the text[319] "Of the best of his own field shall he make restitution," applying to damage wrongfully caused.[320]

The double compensation is regarded as a sanction proportionate to the loss the thief intended to inflict upon the owner. "He pays double its value, so that he is made to suffer the loss he intended to cause to his fellowman."[321]

S. R. Hirsch in his commentary explains the double sanction to be a punishment for a double wrong.[322]

The principle underlying the fourfold or fivefold compensation is the subject of a discussion in the Talmud. R. Me'ir[323] finds its explanation in economic reasons. "Come and see how much work is appreciated by Him at whose word the world was created. In case of the theft (and sale or slaughter) of an ox the sanction is fivefold restitution, because he (the thief) disturbed him in his labour; in the case of a sheep, because it has not been withdrawn, from work, the sanction is fourfold." R. Me'ir then bases his interpretation of the sanction on the comparative economic values of the ox and sheep in the life of an agricultural people.

An entirely different explanation is offered by R. Akiba and Raba.[324]

According to R. Akiba, the selling and slaughtering of the animal showed an "objective change" inasmuch as the owner's right *in rem* of the article was now definitely destroyed, נשתרש בחטא אהני מעשיו, "he was deeply rooted in sin; he acquired title through his actus reus." As long as the object remains unchanged in the possession of

[319] Exod. 22, 4.
[320] Cf. also Baba Kamma 4b.
[321] Maim. Hilk. Gen. I, 4.
[322] See ante, note (59).
[323] Baba Kamma 79b.
[324] Ibid. 67b, 68a.

the thief, the owner, even after he has "abandoned"[325] his property (as owners in case of theft usually do), retains a right *in rem* imposing upon the thief the obligation to return the article in natura. But should the object have undergone a permanent change while in the thief's possession, or should the article (after *ye'ush*) have been transferred to another,[326] the owner would lose his right in rem and would be left to his personal claim against the thief for restitution of the value of the article taken. According to Rabbi Akiba the sanction is imposed only when, through selling or slaughtering the wrong should have been fully completed, i. e. if the sale, etc., had taken place after the object has been irrevocably lost to its owner, that is, after *ye'ush*. Through the theft the object has been withdrawn from the possession of the owner; through the selling or slaughtering, his right of ownership has been destroyed.

Raba, however, offers what may be termed the subjective theory as explanation. According to him the reason for the increase of the sanction results from the repetition of the crime by the thief, מפני ששנה בחטא. This view then places the responsibility upon the act of the thief as it affects his own person, and not as it affects the object taken.

He is therefore amenable to this sanction even before *ye'ush* when the jus in rem has still been kept intact.[327]

The latter view is accepted Halakah.

[325] See chap. V. c. *Ye'ush.*

[326] יאוש ושנוי רשות.

[327] Cf. Rashi Baba Kamma 58a sub v. ששנה בחטא.

Maimonides, Moreh Nebukim, III, 41 (M. Friedlander's translation London 1885, p. 195) "It is right that the more frequent transgressions and sins are, and the greater the probability of their being committed, the more severe must their punishment be, in order to deter people from committing them; but sins which are of rare occurrence deserve a less severe punishment. For this reason one who stole a sheep had to pay twice as much as for other goods i. e. four times the value of the stolen object; but this is only the case when he has disposed of it by sale or slaughter (Ex. 21, 37). As a rule the sheep remained always in the

(b) Bodily Punishment

Bodily punishment as a sanction for theft occurs in the Jewish Law only as a substitute for monetary compensation. It is the alternative to *kefel* etc., if the thief should possess neither moveable property nor real estate from which to make good the loss caused to the owner of the article taken.[328]

The bodily punishment is fundamentally different from the extensive right conceded in other laws to the owner. It stands in striking contrast to the inhuman severity of both the Roman and early Anglo-Saxon and Teutonic Laws. It does not authorize the sale of the offender's body[329] to a private owner; nor is it indiscriminately applicable to all kinds of thieves.

It is in fact a sale, under the supervision of the Court, of the offender's time and work, until the principal has been made good. The penal compensation e. g. the additional value of the *kefel* is not included in the time to be served. It remains a legal debt to be paid as soon as his means permit.

fields, and could therefore not be watched as carefully as things kept in town. The thief of a sheep used, therefore, to sell it quickly before the theft became known, or to slaughter it and thereby change its appearance. As such theft happened frequently, the punishment was severe. The compensation for a stolen ox is still greater by one fourth, because the theft is easily carried out. The sheep keep together when they feed, and can be watched by the shepherd, so that theft, when it is committed, can only take place by night. But oxen, when feeding are very widely scattered—and a shepherd cannot watch them properly; theft of oxen is therefore a more frequent occurrence."

[328] Maim. Hilk. Gen. 3, 11. The compensation is paid out of the offender's "best fields" עידיות. Ibid. and Baba Kamma 4b.

[329] Lev. 25, 39, 40. "Thou shalt not make him to serve as a bond-servant. As a hired servant and as a settler he shall be with thee." Cf. Mekilta ad locum Exod. 21, 2: אי אתה רשאי לשנותו מאומנתו. The owner was not entitled to put him on work different from what he had been accustomed to.

This supervision by the Court protected the wrongdoer from the owner's revenge or arbitrary control. It acted as wholesome palliative to other crimes and at the same time restored to the owner the value of the loss sustained.

It took care of the wrongdoer's human dignity, for he could not be made to perform indiscriminately menial work, or work he had not been accustomed to, and stilled the owner's revenge by solid restitution rather than by degrading punishment of imprisonment or death, as inflicted by the laws of other nations.

In the Torah, the reason for the thief's sale is clearly indicated,[330] "אם אין לו ונמכר בגנבתו" "(he shall make restitution) if he have nothing, then he shall be sold for his theft." This shows that the thief was sold not in order to be punished in his body for the theft committed, but in order to provide compensation for it. Only in case there was no other quid pro quo he was, as a last resort, sold as a substitute.

The impersonal passive "he shall be sold"[331] is taken to refer to the sale by an authorized body i. e. the Court before which the trial took place.

The Talmud[332] further deduces from the text "for his theft" that the sale took place only to provide compensation for the principal, and not for the double compensation.[333] The latter remains a legal debt till his fortune increases.[334] The underlying reason seems to be the following: *kefel* represents monetary punishment for theft. If the law should condemn the thief to be sold for *kefel* it would show that the thief is punished not in his property but in his body, a principle that is clearly against the spirit of the Law. But

[330] Exod. 22, 2.

[331] It does not say ונמכר but ומכרו.

[332] Ḳiddushin 18a ונמכר בגנבתו ולא בכפלו.

[333] Tschernowitz points to the striking example of logical interpretation, see 'She'urim be-Talmud' (Hebrew), Warsaw 1913, p. 98 Note 2.

[334] Maim. Hilk. Gen. III, 12.

if the thief is 'sold' for the restitution of the principal, there clearly is no punishment but only substituted monetary compensation.

A thief if his offence was repeated against the same person could not be sold more than once; the sanction remained suspended in the form of an obligation enforceable as soon as he should be in a position to pay.

But if the offence was repeated against different persons there was no limit to the number of possible sales.[335]

So also, if after being sold it was found out that the value of his labour during the legal maximum of six years did not amount to the value of the article, he could not be sold a second time, although the owner had not received full restitution.

If the market value of the thief as a worker was greater than the value of the article stolen he could not be sold. In fact he was not sold unless (a) his value tallied exactly with the value of the object taken, or (b) was less than its value.[336]

Inasmuch as an Israelitish offender could be sold only for a period of six years[337] it can easily be seen how a second sale, to compensate for the remainder of the principal that had remained unsatisfied, would have resulted in a grave injustice to the thief. For supposing e. g. that the value of the article had corresponded to the value of eight years of labour, the last four years of enforced work in the second sale would amount to bodily punishment entirely unwarranted by the spirit of the law.

It may be taken that the conditions as to the comparative value of the thief's labour and the article stolen very rarely coincided. The insistence of the Talmud on selling the

[335] Maim. Hilk. Gen. III, 15.
[336] Ḳiddushin 18a. Maim. ibid. III, 14.
[337] Maim. Hilk. Abadim II.

thief only for his theft, i. e. in case the article stolen was of greater value than he or of equal value, but not if of less value, undoubtedly made the sanction of sale a comparatively rare occurrence and thus helped to emphasize the character of the *kefel* which aimed primarily at monetary compensation and not at punishment.

For the same reason the sanction of sale could not be applied against a woman "whose sense of shame is stronger" so that, if she were sold, the punishment would not be monetary but bodily.[338]

The sale of a thief was dependent upon the institution of Jubilee being in force.[339] Hence, since this institution fell in abeyance at the time of the second temple, it may be assumed that such sales also ceased about that time.[340]

XVII.

THE LAW OF PROOF: PRESUMPTIONS

A question disputed in any litigation, whether civil or criminal, may be settled either (a) by presumptions or (b) by evidence.

Presumptions are inferences which the law relies upon in deciding any question of fact in the absence of other evidence, or in some cases, in spite of evidence to the contrary being offered. Such presumptions, a technical substitute for evidence, are taken to be the result of actual

[338] Sotah 23a. Maim. ibid. III, 12.

[339] Lev. 25, 39. "He shall serve with thee unto the year of Jubilee."
Erakin 29 אין מכירת הגנב נוהג אלא בזמן שהיובל נוהג.
Gittin 65a אין עבד עברי נוהג אלא בזמן שהיובל נוהג.
Tur Ḥosh. Mish. 348, 9.

[340] See Tschernowitz l. c. p. 99 who cites Josephus Ant. XVI, according to which the re-introduction by Herod of the sale of Jewish thieves brought about the revolt against him.

experiences of human affairs, although in some cases without any apparent reasons, and though the contrary could be proved.[341]

They are of two kinds:

(1) Conclusive presumptions of law, *presumptiones juris* (i. e. drawn by the law) *et de jure* (i. e. an obligatory manner), e. g. in English Law a child under the age of seven has no mens rea. These are inferences of fact so overwhelming that the law will not admit the production of evidence to contradict them.

(2) Prima facie presumptions, rebuttable by evidence to the contrary, *presumptiones juris.*

Most of the presumptions belong to this second class. The Jewish law, in common with other legal systems, has introduced certain presumptions for the guidance of the judges in considering questions of fact. Due to the peculiarity of the Jewish Law in admitting only one form of evidence in criminal cases, viz. testimony through witnesses, it had to fall back upon certain generally accepted rules, which by the extreme care with which they were used and the keen appreciation of practical sense they displayed, acted as an ideal substitute for other forms of evidence.

Only the most important of these can be given here.

(i) Presumption of Honesty—It was presumed that unsworn evidence tendered in a Court of Law in support of a claim or in rebuttal of it was true, a presumption existing against the intentional violation of the biblical command-

[341] Or even in face of the obvious untruth of the case, e. g. the Statutory presumption under the Theatres Act of 1843, which makes it an offence to act publicly for remuneration ("For hire") in a building not licensed, and which provides that if people paid for admission then each of the actors "shall be deemed (or presumed) to have acted for hire." Frankel, op. cit. p. 439, points out that Talmudic Law does not accept presumptiones juris et de jure, but only such as can be supported by a certain degree of probability.

ment:[342] "Thou shalt not bear false witness against thy neighbour."[343] This was presumed of obligation. A similar presumption exists in English Law against the commission of any crime. This holds good not merely in criminal trails but equally in civil cases. The graver the crime the stronger is the presumption.[344]

(ii) There is a presumption against any sudden discontinuance of any existing state of things.[345] If a seriously, yet not hopelessly, sick husband sends a bill of divorcement to his wife who lives in a distant place, the messenger is permitted to hand the bill to the woman, even when he is uncertain if the husband is still alive. It is only when he learns to know of her husband's death that he may not give her the bill, as marriage is dissolved on death. Inasmuch as the Court acts on the presumption that the husband remained alive till notice to the contrary is forthcoming, it might happen that a woman would be given the bill even after her husband was dead.[346]

This presumption is also applied in English Law, especially in questions as to the duration of human life.[347] The strength of this presumption in English Law will depend

[342] Exod. 20, 13.

[343] The famous case of Rex vs. Bradlaugh shows vividly that the validity of an oath in English Law was long dependent upon the person taking it believing in God. Rex v. B. and others, 1883. Cox, Criminal Law Cases, Vol. XV. p. 218 ff. In 1888 an Act was passed which enabled any person to substitute for an oath a solemn affirmation if he objects to being sworn, and states as the ground of such objection either that he has no religious belief (Atheist) or that the taking of an oath is contrary to his religious belief (Quaker). Statute 51 and 52 Vic., c. 46; Maitland, Constitutional Hist. of England, Cambridge 1913, p. 367, 522. (As to unbelievers having been disabled from holding any public office, see Anson, Law and Custom of the Constitution, Parliament, 3rd Ed. pp. 87 ff.).

[344] Rex v. Hazy and Collins, 2 C. & P. 458.

[345] חזקה קמייתא.

[346] Giṭṭin 28a.

[347] Reg. v. Jones, L. R. 11, Q. B. D. 118.

upon the particular circumstances of the case, such as his age and his state of health.[348]

(iii) There is a presumption based upon results obtained in the majority of cases of a certain kind or upon the probability of an individual case following the majority rather than the minority of two possible solutions.

If one finds a joint of meat in the street and is in doubt whether the dietary laws permit its use for human consumption or not, the meat may be eaten if the majority of butcher stores in that particular district sell ritually permissible meat. If the majority, however, sell meat that is ritually forbidden for food, it may not be eaten.[349]

(iv) Omnia presumuntur rite ac solemniter esse acta, i. e. there is a presumption against any departure from the usual routine.

The first-born son as soon as he reaches the age of thirty days must be redeemed by his father, from the priest. Should the father have died before the son was thirty days old, then it is the latter's duty to redeem himself later. He could not, however, rid himself of this duty by claiming that his father had redeemed him before his death. The law would not assume that his father had fulfilled his duty before its proper time.

If the father should have died after the thirtieth day of the son's life, the Law would presume that the redemption had taken place, as there exists a presumption that the average person would fulfill his religious duty.[350]

Similarly, a debtor would not be believed to have paid his debt before the date fixed for it.[351]

[348] Cf. Rex v. Harborne. 2A and E. 540.

[349] Ketubot 15a. Note, however, that this principle is in practice overriden by the rule of בשר שנתעלם מן העין. See Yoreh De'ah 110, 1 and references.

[350] Baba Meṣia 102b.

[351] Baba Batra 5b.

In English law this presumption is of great force not only when applied to Governmental or official acts, but also in private establishments where the conduct of affairs has become so regular as to justify its employment, e. g. if a document bears a date, this is sufficient proof that it was executed on that day;[352] any person who makes a contract is presumed to be of full age.

(v) The possession of property, either real or personal, raises a presumption that the possessor is full owner of it. This is an inference of legal rights from existing conditions of fact. It is based upon experience which, by means of induction, is gained from similar cases and is set up as a maxim for the guidance of judges in the absence of contradictory evidence. This presumption is called חזקה *ḥazaḳah*.[353] *Ḥazaḳah* should not be confused with the Roman usucapio, nor with the German *Ersitzung*.[354] Lewin has shown that Talmudic law has no complete equivalent for usucapio. He complains that the false interpretation of *ḥazaḳah*[355] has been responsible for the fact that the brilliant German Jurist, Joseph Kohler, wrote a lengthy essay on *usucapio* in the Talmudic Law.

Ḥazaḳah according to Lewin, is *Bestärkung, Wahrscheinlichkeitsmachung*, which means that it is a presumption in favor of certain acts or conditions being probable concomitants of other manifest acts.

Such presumption in case of immoveables results from the undisturbed use of them during a period of three years.

[352] Cf. Kenny, op. cit. p. 328, Malpas v. Clements 19 L. J. R. Q. B. 435.

[353] Re *ḥazaḳah* on real estate, Baba Batra 28a; on personal estate, Maim. Hilk. To'en we-Nitan 8, 1.

[354] Isay Lewin, Die Chasaka des talmudischen Rechts, etc. Stuttgart 1912, § 2.

[355] Cf. Frankel, Der gericht. Beweis, p. 441; Kohler's Introduction to Goldschmidts German Transl. of the Talmud. Z-V-R. vol. 20.

Ḥazaḳah in the case of immoveables, under certain conditions, i. e. safeguarding the right of the owner by permitting his plea of ownership, not only acts as a presumption in favor of possession, but also acts as a mode of acquisition.

In case of moveables, *ḥazaḳah* is not employed as a mode of acquisition, and is fundamentally different from the *ḥazaḳah* in case of immoveables.[356]

Ḥazaḳah in case of moveables is raised through possession. From the fact of detention without any further evidence, it is presumed that the possessor is also the owner, but he must have the animus domini, i. e. the will to be the owner. He, therefore, must base his claim upon a titulus, a legal way of acquisition, e. g. he must say: "I bought it from X," or "I received it from X as a donation."

This presumption does not exist in case of moveables that are usually hired out, or in case of certain animals or slaves, nor can it be raised by robbers, craftsmen, partners, guardians of infants, etc., nor by the Exilarch nor by certain relatives.[357]

XVIII

EVIDENCE AND PROCEDURE

The commission of the wrong of *genebah* will usually produce a reaction on the part of the owner whose goods have been taken. It is left to his initiative to set the law in motion.

[356] As to this, see Lewin l. c. § 10. As to the alleged owner's counterclaim, ibin. § 5 and § 11 ff.

[357] Ḥosh. Mish. 133, 134, 135. Lewin 11 ff. Maim. Hilk. To'en we-Nitan 8.

This he may do by charging the alleged offender before a Court of Law with the commission of the wrong, and by producing evidence which, if not rebutted by the accused, will result in his being sentenced to restore the principal, and in addition to pay the fine of *kefel* or the fourfold or fivefold value, as the case may be.

The evidence will naturally be produced only after the accused in reply to the summons[358] issued by the Court at the instance of the prosecutor, has denied[359] his responsibility for the crime. He may deny the presence of the evil intention by pleading that he took the article with the owner's consent e. g. as a bailee, or by mistake; or that he retook his own property from the alleged owner; or (in order to escape the fine) that it was a non-technical theft by taking it by way of joke with the intention of returning it, or that its value was less than a 'Perutah' or that in law it was regarded as without any value at all, e. g. documents of an evidentiary character, etc.

He may also plead that he took the article from a person non sui juris, e. g. from an infant or from an institution to which the private law does not apply, e. g. sacred or temple property.

Apart from presumptions that might aid the prosecutor in his case, it will then be his duty to show that the taking was "the taking by one of the modes of *ḳinyan* of a moveable article of value without the owner's consent[360] and without a claim of right made bona fide, with the intention of depriving the owner of it permanently."

[358] Baba Kamma 106b. "He was summoned by an officer of the court to appear at a certain date." See רש"י ibid ad שליח דרבנן.

[359] Ibid.

[360] He would not have to prove that he was the owner if the article had been taken from his house, the presumption obtaining that a possessor of an article is its owner.

In the case of a bailee, whose taking of the article had originally been lawful (i. e. done with the owner's consent) the prosecutor would have to prove that the bailee afterwards by taking the bailment stole it in breach of his contract, and thus converted his legal possession into unlawful possession.

Should the prosecutor have been successful, it would increase the degree of responsibility of the convicted thief for the loss of the article, in case the article should have been lost after the theft. Whereas a bailee, as we have seen, (with the exception of the borrower) is liable for, at the most 'quasi-accidental' loss of the article bailed, a defaulting bailee, like a thief, would be taken to insure the article even against loss by inevitable and unavoidable accident.

Rules of Evidence

Evidence may be classified according to differences in its intrinsic nature, into two kinds: (a) evidence through the oral testimony of witnesses. (b) evidence through oath, confession, documents and the plea of מיגו "*Miggo.*"

The evidence obtained through the testimony of two witnesses is applicable in both civil, and criminal (capital) cases, the other one only in civil cases. This rule is based on the biblical statement, "One witness shall not rise up against a man for any bodily punishment or for any monetary sanction in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses shall a matter be established."[361] "At the mouth of two witnesses, or three witnesses shall he that is to die, be put to death; at the mouth of one witness he shall not be put to death."[362]

[361] The translation of this verse follows the interpretation of RaSHI and Targum Jonathan. See also David Hoffmann, Das Buch Deuteronomium, p. 361–62. It deviates from the accepted versions.

[362] Deut. 19, 15 and 17, 6. Frankel, op. cit. p. 115 ff.

Whereas in case of capital crimes, in order that the evidence may be admitted the actus reus must have been seen by two witnesses at the same time and on the same spot, in penal cases (such as theft, etc.) and civil cases the evidence of witnesses who saw the commission of the wrong from different places is admissible.[363]

The evidence of the slaughtering or selling of the animal need not be produced by the same pair of witnesses who saw the stealing. The testimony of both pairs is taken as one.[364]

According to the foregoing, the sanction of *kefel* or the four and fivefold compensation can only be imposed upon the testimony of two witnesses to the commission of the actus reus.

Execution

On the accused being sentenced by the Court to pay the fines imposed on him, an officer of the Court armed with a writ is authorized to collect them from the personal property of the accused, or if none be available, from the fields of best quality which he possesses.

There are elaborate provisions in the Talmud for granting the accused facilities for selling his property at the best terms in order to meet the fine, and for that purpose the date for the payment of the fines may be postponed at the discretion of the Court.[365]

It is also necessary that the accused be informed beforehand of the Court's decision to have his property sold by an officer of the Court.

[363] Makkot 6b. עדות מיוחדת a single incomplete testimony.
[364] Ḥosh. Mish. 30.
[365] Baba Kamma 112b.

XIX.

EXCURSUS ON EVIDENCE

It is claimed by such eminent authorities as the late Professor F. W. Maitland;[366] and Professor C. S. Kenny[367] that the English rules of evidence "were created in consequence of a peculiarity of English procedure in taking away from the trained judges the determination of questions of fact, and entrusting it to untrained laymen. The Romans had no law of evidence; for with them, questions of fact were always tried by a *judex* who was a citizen of rank and intelligence (e. g. under the Republic, a senator or a knight). But in England such questions were left to plain jurymen whose inexpertness led the courts to establish many rules for the exclusion of certain kinds of evidence that seemed likely to mislead untrained minds."[368]

The extreme care which the Jewish law evinced in the appointment of its justices,[369] shows that the jurists of the Talmud were fully aware of the danger that lurked in an unbridled admissibility of evidence. A man whose experience of human affairs is scanty and whose imagination as a

[366] Maitland, Constit. History Cambridge, 1913, p. 115–131, 211–213, holds that the germ of the trial by jury is found in the prerogative procedure of the court of the Frankish kings. In course of time it became distinctly English. In France this procedure perished, transplanted to England it grew and flourished, and became that trial by jury which after long centuries Frenchmen introduced into modern France as a foreign, an English institution.

[367] Kenny, op. cit. p. 324ff.

[368] This view is opposed by C. P. Sherman in his "Roman Law in the modern World," II. p. 415 and note 64. "To claim that the origin of the Anglo-American Hearsay Rule was our jury system—the necessity of preventing the jury from listening to improper evidence—is to imply at least that but for the jury system these rules would not now exist; such a claim entirely overlooks the facts that Roman law—in which there is no jury—had a hearsay rule quite similar to the English . . . The English trial by jury has a Roman root. There was an institution somewhat like the jury in Roman Criminal procedure."

[369] Frankel, op. cit. p. 88.

consequence is easily impressed, is apt to regard as conclusive evidence facts which by experienced judges would be refuted as too weak or inconclusive for the Court to rely upon.[370]

The Jewish Criminal Court decided questions both of law and fact. The judges were persons of practical experience in the Law and well versed in human affairs. The independence from any outside interference which the highest Criminal Court, the *Sanhedrin*, enjoyed, was undoubtedly shared by the minor Courts, and acted as a safeguard against any miscarriage of justice due to royal pressure.[371]

In common with other laws, the Jewish law regards circumstantial evidence as less weighty than direct evidence.

Direct evidence is such evidence as either asserts or denies one or more of the facta probanda, i. e. of the 'facts at issue,' the facts which are such that if they be true, the prisoner (accused in criminal cases) is necessarily guilty.[372]

Indirect or circumstantial evidence is such evidence as only asserts or denies more facta probantia, i. e. facts that are relevant to the issue but are not themselves in issue.[373] The view taken by the English Law is that circumstantial evidence should be accepted as well as direct evidence, but subject to cautions. (a) that there should be no conviction for larceny until the fact of a theft has been established by

[370] Ibid. 186, note (2).

[371] Ibid. 84–45, Cf. the conflict of Coke L. J. with the Kings of England, Maitl. Constitutional History, 268–271.

[372] Kenny, op. cit. p. 331 ff. Direct evidence may be overthrown either by circumstantial evidence or by incredibility. Cf. Tichborne Case, the greatest case in the history of the world as to number of witnesses produced. Reg. v. Castro, Annual Register, vols. 1871–1874.

[373] An example of circumstantial evidence: In 1915 a man was indicted in the English Courts for 'publishing' a libellous letter. It was written on a page torn out of a book. A copy of that book with that page torn out was found in his house. That is a circumstantial evidence that he wrote the libel.

direct, or at any rate by overwhelming circumstantial evidence, though the prisoner's connection with the theft may then be proved by circumstantial evidence. (b) that there must be no conviction for homicide until the fact of death has been established by direct evidence or by overwhelming circumstantial evidence e. g. where a little child had been thrown by the prisoner into a deep dock and never seen again, the jury were forbidden to convict, because there was a bare possibility that, as the dock communicated with the river, the child might have been washed out into the river and there rescued.[374]

Talmudic Law, with very few exceptions—which result from the nature of certain wrongs[375]—pronounces against the admissibility of circumstantial evidence. Thus, e. g. a Court of Law would not be permitted to pronounce sentence of death in capital crimes on the strength of circumstantial evidence only. There was a provision that, in case such evidence should prove of very great force, the accused could be sentenced to a term of imprisonment at the discretion of the Court.[376]

It is remarkable to note this agreement with almost all modern laws against the imposition of the death sentence in the absence of direct evidence.

[374] Cf. the distinction between מים שיש להם סוף and מים שאין להם סוף, in the presumption of death of husband, Eben ha-Ezer. 17, 107. I am indebted to Rev. Dr. M. Hyamson for drawing my attention to this analogy.

[375] If circumstantial evidence be totally rejected, then a conviction could be very rarely obtained in cases of adultery and other crimes the perpetrators of which usually take pains to have no eye-witnesses. This reason holds good also in English Law. Cf. Frankel; ibid. 188 note (1); Baba Meṣia 91b; Makkot 7a; Maim. Isure Bi'ah I, 19.

[376] Sanhedrin 81b. 'If one commits murder without witnesses (i. e. without direct evidence by witnesses being available) he is sentenced to imprisonment with meager fare of bread and water.'

Hearsay evidence was excluded in Roman Law,[377] and is inadmissible in English Law. Hearsay evidence is defined by Kenny:[378] "A witness who has received from someone else a narrative of facts, even though they be the very facta probanda, is not allowed to give this narrative in evidence."

The inadmissibility of hearsay evidence went through a long process in England. On the continent, owing to the late introduction of the jury system, the admission of hearsay had become a routine so inveterate as to be retained even when the untrained jurymen were apt to use it in counteracting justice.[379] Before the jury had been introduced, hearsay was a comparatively harmless instrument in the hands of trained judges.

The Mishnah gives us a vivid illustration of the care that was exerted in bringing home to the witnesses their responsibility in rendering evidence in criminal cases.[380]

"By what means were the witnesses impressed with awe in criminal cases?[381]

"They were brought in and warned by the Court: 'Perhaps your testimony is based only on a supposition, or on hearsay, or on that of another witness, or you assume you have heard it from a reliable person; or you may not know that finally we will test your evidence by examination and cross-examination. Remember there is no similarity between civil and criminal (capital) cases. In civil cases, the witness by whose false testimony an innocent man has

[377] Pollock & Maitland Hist. II. 620. Kenny p. 364, cites Plautus to prove that the Romans recognized its defect: "Pluris est oculatus testis unus quam auriti decem: qui audiunt, audita dicunt; qui vident, plane sciunt." Plaut. Trucul. II, 6; yet in 1598 even Jean Bodin said, "In cases of witchcraft, common repute is almost infallible." (Kenny ibid.).

[378] Ibid.

[379] See ante note (21). Kenny, op. cit. p. 364.

[380] Sanhedrin 37a.

[381] Rashi ibid. 'to render true testimony.'

been convicted may render money payment and thus atone. But in a capital offence, the responsibility of the shedding of blood of the man executed and of his potential progeny, to the end of all generations, is borne by the witness whose testimony results in the imposition of the death sentence."

The Talmud,[382] in discussing this admonition to the witnesses shows that the possibility of the evidence being circumstantial or hearsay evidence should be treated by the judges with proper caution; especially was it the judge's duty to find if the testimony of the witnesses was based on subjective elements, e. g. delusion, imagination, etc., or hearsay.

It also shows that the veracity of the testimony was tested by examination and cross-examination.

Such admonitions were also usual in civil cases. But there was no definite formula used, as in criminal cases.[383]

Leading Questions

Simeon B. Shetaḥ's[384] famous dictum on this point says: "Take great pains in examining the witnesses; but take care with your words lest through them they (the witnesses) learn to lie!" This contains a double warning: (a) Against superficial examination of witnesses, which might enable them to withhold testimony and thus not produce complete or true evidence. (b) Against putting 'leading questions' which in many cases draw the attention of the witness to a possible evasion of the truth by suggesting to him that a particular answer is desired by the questioner.

[382] Ibid. 37b.

[383] Note also that in English Law, in Civil Cases, weight of evidence decides for one side or the other. In Criminal Cases, conviction requires that the charges should be proven beyond reasonable doubt.

[384] Abot I, 9. The only dictum of his that has come down to us.

The same rule applies to civil and criminal cases. Leading questions may not invariably be put in English Law,[385] because: (a) 'to a false witness they suggest what particular lie would be desirable, and (b) even an honest witness is prone to give an assenting answer because of mere mental laziness.

The use of leading questions was also restricted in Roman Law.[386]

As in modern English Law so in Talmudic Law, these stringent rules could be relaxed, at the discretion of the Court, in civil cases. There are also elaborate provisions for the proper examination of witnesses and differences between such examinations in civil and criminal matters.[387] The witnesses were not sworn in, unless there was a special reason for doing so, e. g. if their veracity was suspected.[388]

Also in most cases, with the exception of those where *res ipsa loquitur*, i. e. where from the peculiar conditions obtaining mens rea could be deduced as a matter of course, the witnesses had to testify as to having 'forwarned' the wrongdoer not to commit the crime. It was only when in answer to their admonition he said, "I know it and in spite of it I shall do it," that punishment of *malkot* (stripes) or sentence of death, as the case may be, was imposed.

Similar provisions are found in English Law. The rules of evidence may be waived in civil cases.[389] But the witnesses are always sworn in. The forensic means for obtaining mens rea are not as stringent as the Jewish institution of *hatra'ah*.[390]

[385] Kenny ibid. 349. 'But leading questions may be put in cross-examinations where the objections do not hold good.'

[386] D. 48, 18, 1 21.

[387] Frankel, op. cit. p. 189, 190, 195, 222.

[388] Ibid. 268.

[389] Kenny, op. cit. 341.

[390] Frankel, p. 223. As to the inadmissibility of witnesses in English Law, see Kenny, p. 374; in Talmudic Law, Frankel, p. 246 ff.

XX

CONCLUSION

The subject of *genebah* lends itself, perhaps more than any other offence against property, to a discussion of those elements of substantive and adjective law which enter into the concept of a typical wrong against property.

The author therefore thought it appropriate to discuss, after a short sketch of the salient characteristics of the Jewish Law, first those mental and physical elements that are intrinsic in all legal wrongs; then to narrow his inquiry to the field of *genebah* and to allied spheres in Roman and English Law; finally, to discuss the way in which the wrongdoer is brought to justice i. e. the modes of judicial proof and procedure.

It is hoped that by following this course the author has presented not only a fairly complete picture of the wrong of *genebah* from its inception in the mind of the malfeasant to its sanction, but also a cross-section of the Jewish Law of Wrongs.

While this method necessitated the discussion of concepts and laws that are not directly related to the law of *genebah*, it perhaps served to bring into relief the remarkably comprehensive development, through the interpretation of the Rabbis during the last two thousand years, of the biblical command "Thou shalt not steal" and to indicate the continuity of Jewish legal development.

Just as one who knows more than one religion gains a deeper understanding of his own religion, so the jurist who goes to foreign laws to enrich his legal experience, acquires a better appreciation of his own law.

It is hoped that this book may in some small measure contribute to this end.

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